Supreme Court, U. S.
FILED
JUL 27 1976
MICHAEL RODAK, JR., CLERK

No. 76-120

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

MARTIN LINEN SUPPLY COMPANY and
TEXAS SANITARY TOWEL SUPPLY CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-9a) is reported at 534 F.2d 585. A prior opinion of the court of appeals (App. C, *infra*, pp. 11a-28a) is reported at 485 F.2d 1143. A prior opinion of the district court (App. D, *infra*, pp. 29a-39a) is not officially reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 10a) was entered on June 21, 1976. On July 15, 1976, Mr. Justice Powell extended the time within which to file a petition for a writ of certiorari to and including August 20, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Double Jeopardy Clause precludes an appeal by the United States from an order, otherwise appealable under 18 U.S.C. 3731, because the order was entered in response to a motion filed several days after a mistrial had been declared because of the inability of the jury to reach a verdict at an earlier trial of the same charge.

CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *.

2. The Criminal Appeals Act, 18 U.S.C. 3731, provides in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

3. Federal Rule of Criminal Procedure 29(c) provides:

> If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

STATEMENT

On December 9, 1971, the United States filed civil and criminal contempt petitions in the Western District of Texas. The petitions alleged that respondents, two commonly owned linen supply companies, and their president, William B. Troy, violated a consent decree entered in 1969 as the final judgment in an antitrust suit. See App. G, *infra*, pp. 44a-52a.

The district court dismissed the petitions to the extent they alleged violations of Section V(A)(1) of the consent decree. Section V(A)(1) prohibits respondents from "directly or indirectly: (A) Threat-

ening, coercing, inducing or attempting to induce: (1) Any linen rental supplier to refrain, while in business, from furnishing linen supplies to any customer" (App. G, *infra*, pp. 46a-47a). The contempt petitions alleged that respondents threatened their competitors with economic reprisals. The district court concluded, however, that Section V(A)(1) does not prohibit respondents from threatening competitors with economic reprisals, or offering to competitors economic inducements, in order to induce the competitors to quit soliciting linen supply business from respondents' existing customers (App. D, *infra*, pp. 34a-39a).

The United States appealed, and the court of appeals reversed. It wrote that the activities alleged in the petition are violations of the decree "if their announced purpose is to cause [respondents'] competitors to refrain from competing * * *. * * * [T]he use of threats directed at competitors to restrain competition, or to obtain reciprocal noncompetitive agreements, as the Government alleges, goes to the heart of the antitrust problem" (App. C, *infra*, p. 27a). The court remanded for a trial to determine whether the allegations are true. This Court denied certiorari. 415 U.S. 915.

After the prosecution declined to consent to a bench trial, the district court severed the criminal and civil proceedings. The criminal trial commenced on February 18, 1975.[1]

[1] The civil contempt proceedings have not yet been tried.

At the trial, several witnesses described a series of threats of economic retaliation by different executives of respondent Martin Linen, directed at different competitors. The witnesses also testified that two executives of respondent Martin Linen threatened Flake Uniform Linen Service with retaliation if it persisted in soliciting customers of respondent Texas Sanitary. The government also presented testimony and documents demonstrating that respondent Martin Linen conducted a retaliatory sales campaign against Flake Uniform. Respondents did not offer any evidence to contradict the evidence concerning threats.

On February 21, 1975, the jury returned a verdict of not guilty with respect to Mr. Troy. The jury reported that it was deadlocked with respect to respondents.[2] The court excused the jurors and declared a mistrial as to respondents (App. A, *infra*, pp. 2a-3a).

After the jurors had departed, the district judge advised counsel that he would be inclined "to enter a judgment of acquittal as to [respondents] if an appropriate motion was made" (J.A. 673a). He also said (J.A. 676a-677a): "Sometimes the Defendant enters into a consent decree and later rues the day that he did it and wishes that he had had an opportunity to retry that question again. Once he is under it, then it is up to the Court to let him out of it."

[2] The jurors reported that the vote stood eleven to one in favor of conviction. J.A. 669a-670a. ("J.A." refers to the joint appendix in the court of appeals).

On February 27, respondents accepted the court's invitation and filed motions for acquittal. On April 22, more than two months after the mistrial had been declared, the district court entered judgments of acquittal. Although the court did not render findings of fact or conclusions of law, the judgments recited that "the Court finds that the grounds set forth in [the motion for acquittal] are good and valid and that the Government has failed to prove the material allegations beyond a reasonable doubt; that further this defendant should be found 'not guilty'" (Apps. E and F, *infra*, pp. 41a, 43a).

The United States appealed pursuant to the Criminal Appeals Act, 18 U.S.C. 3731. The court of appeals concluded that the Double Jeopardy Clause barred the government's appeal. The court observed that the proceedings in the district court ended in an "acquittal" entered under Fed. R. Crim. P. 29(c) (App. A, *infra*, pp. 4a-5a). It quoted *United States* v. *Jenkins*, 420 U.S. 358, 370, as establishing a "general rule" (App. A, *infra*, p. 7a) that "it is enough for purposes of the Double Jeopardy Clause, and therefore for the determination of appealability under 18 U.S.C. § 3731, that further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand." Because a reversal of the district court's "acquittal" would enable the government to try respondents a second time, the court concluded that the "general rule" announced in *Jenkins* "leads inescapable to the

conclusion that no appeal lies from the directed verdict ordered by the court below" (App. A, *infra*, pp. 7a-8a).[3]

The government had relied in the court of appeals upon *United States* v. *Sanford*, 421 U.S. 996. The court of appeals in *Sanford* had dismissed a government appeal from a post-mistrial order dismissing an indictment. This Court remanded the case for reconsideration in light of *Serfass* v. *United States*, 420 U.S. 377, an action which the court of appeals took to mean that the appeal should be permitted in that case (App. A, *infra*, pp. 8a-9a).[4] The court distinguished *Sanford*, however, observing that the district court in *Sanford* had dismissed the indictment long after the time for filing a post-trial motion under Fed. R. Crim. P. 29(c) had elapsed. In the court's view, this made the order in *Sanford* an appealable "pretrial dismissal" (App. A, *infra*, p. 9a), whereas the order in the instant case was nonappealable because it was an "acquittal" entered pursuant to a motion made within seven days after the mistrial.

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[3] The court of appeals did not discuss or distinguish its apparently contrary decision in *United States* v. *Moon*, 491 F.2d 1047 (C.A. 5). It seems fair to say, however, that the court of appeals would have concluded that *Moon* has been undercut by *Jenkins*.

[4] The court of appeals evidently was unaware that almost a month before the date of its decision the appeal in *Sanford* had been dismissed a second time. See *United States* v. *Sanford*, C.A. 9, No. 73-3016, decided May 27, 1976, petition for a writ of certiorari pending, No. 75-1867.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision in this case exacerbates the conflict among the circuits discussed at page 14 of our petition for a writ of certiorari in *United States* v. *Sanford*, No. 75-1867.[5] The court of appeals in this case, like the court of appeals in *Sanford*, has held that the United States cannot appeal from a post-mistrial order dismissing an indictment. But the court here, unlike the court in *Sanford*, has distinguished between two types of post-mistrial orders: it has held that when an indictment is dismissed (or an "acquittal" entered)[6] on motion made within seven days of the mistrial, the Double Jeopardy Clause bars further proceedings, but that when the motion is made eight or more days after the mistrial has been declared, the Double Jeopardy Clause does not bar an appeal or further proceedings.

Under the rule announced by the Fifth Circuit, *both* of the conflicting cases discussed in our *Sanford* petition are wrongly decided. *Sanford* itself was wrongly decided by the Ninth Circuit, according to the Fifth Circuit: the appeal should have been allowed because the dismissal in that case came so

[5] Counsel for respondents in this case are being furnished with a copy of our petition in *Sanford*, and counsel for respondents in *Sanford* is being furnished with a copy of this petition.

[6] As the court of appeals recognized (App. A, *infra*, p. 2a n. 3), the label attached to the order terminating the prosecution is immaterial. *United States* v. *Wilson*, 420 U.S. 332; *Serfass* v. *United States*, 420 U.S. 377, 390-393.

long after the mistrial. *United States* v. *Wilson*, 534 F.2d 76 (C.A. 6), also was wrongly decided under the Fifth Circuit's test, because there the motion to dismiss the indictment was made on the same day the mistrial was declared.

We submit, instead, that the present case and *Sanford* were wrongly decided, and that *Wilson* is correct. There is no reason why appealability should turn upon the length of the interval between the declaration of a mistrial and the filing of a post-mistrial motion to dismiss the indictment.[7] Although the Double Jeopardy Clause gives defendants[8] in criminal cases interests in avoiding multiple trials and in preserving the finality of verdicts in their favor, neither interest is implicated here. Once the mistrial had been declared, the prosecution was entitled to try respondents a second time without viola-

[7] Cf. *United States* v. *Wilson*, *supra*, 420 U.S. at 345 (there is no valid reason to distinguish between post-trial "acquittals" by trial courts and post-trial "acquittals" directed by appellate courts).

[8] Respondents are corporations. This Court has not held that the Double Jeopardy Clause of the Fifth Amendment applies to corporations, and there are strong arguments that it does not apply. See Note, *Double Jeopardy and Corporations: "Lurking in the Record" and "Ripe for Decision,"* 28 Stan. L. Rev. 805 (1976). The Court has held that other provisions of the Fifth Amendment, such as the Self-Incrimination Clause, do not apply to corporations. See *Bellis* v. *United States*, 417 U.S. 85; *Wilson* v. *United States*, 221 U.S. 361. We did not argue in the court of appeals, however, that the Double Jeopardy Clause does not apply to corporations, and accordingly we have not presented it as a question for this Court.

tion of the Double Jeopardy Clause; so much has been settled since *United States* v. *Perez*, 9 Wheat. 579. And respondents have no interest in preserving the finality of a "verdict" in their favor, because there is in this case no such verdict. Indeed, there is no verdict at all, the finder of fact—the jury—having divided eleven to one for conviction. The trial judge has no authority to resolve factual issues in a jury trial (*United States* v. *Cravero*, 530 F.2d 666 (C.A. 5)), and so no factual determinations would be subject to reexamination on a second trial. The Double Jeopardy Clause therefore does not bar a second trial of respondents. See Note, *Government Appeals of "Dismissals" in Criminal Cases*, 87 Harv. L. Rev. 1822 (1974).

For these reasons, and for the reasons set out at pages 10-17 of our petition in *Sanford*, we believe that the Double Jeopardy Clause does not preclude a second trial of respondents and accordingly does not preclude an appeal by the United States. In our view, *Serfass* and this Court's remand in *Sanford* make this clear beyond cavil. Because the court of appeals in this case has distinguished between two types of post-mistrial orders dismissing an indictment, however, this Court's disposition of *Sanford* (should it grant our petition in that case) would not technically be controlling here. On the other hand, if the Court were to hold that an appeal is permissible in this case, the government's right to appeal in *Sanford* would follow *a fortiori*. The Court may therefore prefer

to consider the issue we present in the context of the instant case and to defer consideration of the petition in *Sanford*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1976.

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 75-2322

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

MARTIN LINEN SUPPLY CO., and TEXAS SANITARY TOWEL SUPPLY CORP., DEFENDANTS-APPELLEES

June 21, 1976

Appeal from the United States District Court for the Western District of Texas

Before GOLDBERG, DYER and SIMPSON, Circuit Judges.

GOLDBERG, Circuit Judge.

The United States appeals to this Court under the provisions of 18 U.S.C. § 3731 [1] from the district

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[1] Section 3731 provides in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or

court's order granting directed verdicts of acquittal to defendant-appellees Martin Linen Supply Company (Martin Linen) and Texas Sanitary Towel Supply Ccrporation (Texas Sanitary Towel), after a trial by jury on criminal contempt charges that resulted in a hung jury.[2] Section 3731 allows the Government to appeal from any decision dismissing an indictment or information except where the double jeopardy clause of the Constitution prohibits further prosecution.[3] Because we find that the double jeopardy clause would bar further prosecution in this case, we dismiss the appeal for lack of appellate jurisdiction.

Appellee's contempt trial began on February 18, 1975. Three days later, on February 21, 1975, the jury returned a verdict of not guilty as to William B. Troy, an individual defendant whose case is not before us. At the same time, the jury informed the court that it was unable to agree on a verdict as to Martin

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order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

[2] The Government brought the criminal contempt proceeding to enforce the terms of an antitrust consent decree that had been entered on June 2, 1969. Martin Linen and Texas Sanitary Towel had been charged in a civil complaint with violating section 1 of the Sherman Act, 15 U.S.C. § 1.

[3] Because the Supreme Court has focussed on the effect of the ruling sought to be appealed rather than the label placed on the order, we too attach no significance to the fact that the district court here called its order an "acquittal" and not the "dismissal of the indictment." *See, e.g., United States* v. *Wilson,* 1975, 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2d 232.

Linen and Texas Sanitary Towel. The court then excused the jurors and declared a mistrial.

After the jurors had departed, the court indicated that it would entertain a motion for directed verdict of acquittal as to Martin Linen and Texas Sanitary Towel, making the following observations:

> I'll be frank with you, gentlemen. I almost instructed a verdict for all Defendants in this case. I almost granted a judgment for the Defendants. I think this is one of the weakest—I'm saying you did a very creditable job with what you had, Mr. Sonnett [Government attorney]. I have seen some contempt cases, but this is without a doubt the weakest I've ever seen.

The judge's next comments revealed his opinion that certain parts of the consent decree were undesirable, in that they placed the companies at a competitive disadvantage. Responding to the court's invitation, the two corporate defendants filed motions for judgments of acquittal on February 27, 1975. The Government filed a memorandum in opposition to the motions. On April 22, 1975, the court granted the motions and entered judgments of acquittal for both defendants.[4] From the order the Government noticed its appeal.

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[4] Both judgments of acquittal recited that the motions were timely made and that "after considering all of the evidence adduced on the trial [of the charges] and all of said motions filed herein having been carefully considered by the Court, the Court finds that the grounds set forth in that Motion are good and valid and that the Government has failed to prove the material allegations beyond a reasonable doubt; that fur-

Federal Rule of Criminal Procedure 29(c) permits the court to entertain a timely motion for acquittal after the jury is discharged:

> If the jury returns a verdict of guilty *or is discharged without having returned a verdict*, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. *If no verdict is returned the court may enter judgment of acquittal.* It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury. (Emphasis added.)

The procedure followed in the case before us comported with the requirements of Rule 29(c). The jury was discharged without having returned a verdict; defendants filed their motions for judgments of acquittal within 7 days after the discharge of the jury; and the court entered judgments of acquittal. For the purposes of appellate review, therefore, this is not a case in which the standard governing retrial after a mistrial governs,[5] despite the Government's

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ther this defendant should be found 'not guilty'." In light of this formal finding by the court, we think that the judge's comments regarding his personal opinion of the consent decree are irrelevant.

[5] A new trial is proper after a mistrial in cases where "there is a manifest necessity for the act [of declaring a mis-

efforts to make it so.[6] As the Supreme Court said in

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trial], or the ends of public justice would otherwise be defeated." *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579, 6 L.Ed. 165 (1824). *See United States* v. *Kessler*, 5 Cir. 1976, 530 F.2d 1246; *United States* v. *Gordy*, 5 Cir. 1976, 526 F.2d 631, 635.

At the trial court level, a two-fold inquiry would be necessary in a case in which the jury was unable to reach a verdict and a timely motion was made under Rule 29(c). First, the district judge would have to weigh the evidence to see if it would have been sufficient to submit to the jury. *See United States* v. *Martinez*, 5 Cir. 1973, 486 F.2d 15, 23. Only if he decided this question in favor of submission would he reach the second inquiry, which would be whether a second trial should be permitted after the mistrial, applying the *Perez* standard.

[6] The Government argues that its right to insist on a jury trial would be abridged if this Court views the proceedings below as if they were the result of a bench trial. This assertion ignores, however, the fact that whether the trial is to a jury or to the court, if the evidence is deemed insufficient to support a verdict or finding of guilty the court must grant a directed verdict of acquittal. *United States* v. *Martinez*, 5 Cir. 1973, 486 F.2d 15, 23.

Furthermore, the Supreme Court clearly rejected any distinction between bench and jury trials in *United States* v. *Jenkins*, 1975, 420 U.S. 358, 366, 95 S.Ct. 1006, 1011, 43 L.Ed.2d 250, 257. The Government's argument that an appeal would have been permitted in *Jenkins* if the district judge had made *all* findings of fact in the Government's favor and had entered judgment for the defendant as a matter of law relies on the wrong analogy. The case it poses is analogous to a jury verdict of guilty followed by a court-directed judgment of acquittal, a situation in which the Government admittedly can appeal. *United States* v. *Wilson*, 1975, 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2d 232; *United States* v. *Cravero*, 5 Cir. 1976, 530 F.2d 666. A mistrial followed by a directed verdict of acquittal is, in our opinion, quite a different case.

United States v. *Jenkins*, 1975, 420 U.S. 358, 365, 95 S.Ct. 1006, 1011, 43 L.Ed.2d 250, 256 n. 7:

> [W]e think it is of critical importance whether the proceedings in the trial court terminate in a mistrial as they did in the Somerville line of cases [*Illinois* v. *Somerville*, 410 U.S. 458 (1973)], or in the defendant's favor, as they did here.

Cf. United States v. *Wilson*, 1975, 420 U.S. 332, 348, 95 S.Ct. 1013, 1024, 43 L.Ed.2d 232, 244 (although retrial after mistrial sometimes permissible if no verdict or judgment entered, verdict of acquittal forecloses retrial and thus bars appellate review). Since the proceedings here terminated in the defendant's favor, we must decide whether this is a case in which the Government may appeal after a directed verdict of acquittal.

The language of section 3731 makes appealability dependent on another question: would the double jeopardy clause of the Constitution bar further proceedings under these circumstances? Congress deliberately chose to make the Government's right to appeal as broad as the Constitution would permit when it passed Title III of the Omnibus Crime Control Act of 1970, Pub.L. 91-644, in which the present version of 18 U.S.C. § 3731 appeared. Recently the Supreme Court discussed the scope of amended section 3731 in three cases: *Serfass* v. *United States*, 1975, 420 U.S. 377, 95 S.Ct. 1055, 43 L.Ed.2d 265; *United States* v. *Jenkins*, 1975, 420 U.S. 358, 95 S. Ct. 1006, 43 L.Ed.2d 250; and *United States* v. *Wilson*, 1975, 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2d 232. *Serfass* stressed the necessity of a finding that jeopardy has attached as a prerequisite to the applicability of the double jeopardy clause. That requirement is certainly satisfied in the case before us; not only was a jury empaneled and sworn, but it actually heard all the evidence both sides had to offer.

Jenkins stated the general rule for appealability as follows:

> But it is enough for purposes of the Double Jeopardy Clause, and therefore for the determination of appealability under 18 U.S.C. § 3731, that further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand.

420 U.S. at 370, 95 S.Ct. at 1013, 43 L.Ed.2d at 259 (per Rehnquist, J.). If such additional proceedings would be required, then the double jeopardy clause forbids appeal by the Government. In the case of a mistrial followed by a timely motion for acquittal under Rule 29(c), F.R.Crim.P., which motion is granted, further proceedings devoted to the resolution of factual issues would necessarily follow a successful appeal by the Government. This distinguishes the situation where an acquittal follows a mistrial from the situation presented in *Wilson*, where an acquittal came after a guilty verdict, since in the latter case no further proceedings would follow a successful appeal. The *Jenkins* standard thus leads

inescapably to the conclusion that no appeal lies from the directed verdict ordered by the court below.

The Government's last effort to avoid dismissal of the appeal relies on the Supreme Court's action in relation to *United States* v. *Sanford*, 9 Cir. 1974, 503 F.2d 291. In that case, an indictment had been returned against the defendants and the case was tried in February 1973. That trial resulted in a hung jury and a mistrial. Prior to the retrial, defendants moved to dismiss the indictment. Relying on the evidence adduced at the first trial, the district judge granted the motion. The Ninth Circuit dismissed the Government's appeal, but its decision was vacated and remanded by the Supreme Court for further consideration in light of *Serfass*. *United States* v. *Sanford*, 1975, 421 U.S. 996, 95 S.Ct. 2392, 44 L.Ed. 2d 663.

The Supreme Court's remand of *Sanford* can be reconciled easily with our conclusion that *Jenkins* requires us to dismiss the instant appeal. Prior to *Serfass*, cases such as *United States* v. *Sisson*, 1970, 399 U.S. 267, 90 S.Ct. 2117, 26 L.Ed.2d 608, had indicated that appeals from acquittals based on facts external to the indictment might be barred by the double jeopardy clause. The *Wilson* court, however, read *Sisson* as narrowly as possible, and indicated that the result might be different under the amended section 3731. *Serfass* held that the Government could appeal from a pretrial dismissal of an indictment, since at that time jeopardy had not attached. Since the time for a Rule 29(c) motion had apparently

long since elapsed in *Sanford*, the case no longer fell into the category of a mistrial followed by a timely acquittal. Rather, the district court's order was simply a pretrial dismissal, and as such was subject to the *Serfass* decision's rule. In the case before us, in contrast, the acquittal occurred while the original trial court still had jurisdiction over the whole case, in accordance with the Federal Rules of Criminal Procedure. We therefore reject the Government's suggestions that the Supreme Court's action in *Sanford* requires us to find appellate jurisdiction here.

For the reasons stated above, we conclude that this Court has no jurisdiction over the Government's appeal.

APPEAL DISMISSED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1975

No. 75-2322

D. C. Docket No. SA-71-CR-419

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

versus

MARTIN LINEN SUPPLY CO., and TEXAS SANITARY TOWEL SUPPLY CORP., DEFENDANTS-APPELLEES

Appeal from the United States District Court for the Western District of Texas

Before GOLDBERG, DYER and SIMPSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal in the above styled and numbered cause be, and the same is hereby, dismissed.

June 21, 1976

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 72-2796, 72-2800

UNITED STATES OF AMERICA, PETITIONER-APPELLANT

v.

MARTIN LINEN SUPPLY COMPANY, ET AL., RESPONDENTS-APPELLEES

Oct. 9, 1973

Before THORNBERRY, AINSWORTH and RONEY, Circuit Judges.

RONEY, Circuit Judge:

This is an appeal from orders of the District Court resulting in the dismissal before trial of civil and criminal contempt petitions brought by the United States charging violations of a final judgment in a civil antitrust action. Contrary to the argument of the respondents, we hold that we have appellate jurisdiction to review these orders which we reverse on the ground that the conduct charged in the petitions could constitute a violation of the antitrust decree.

The antitrust judgment, a consent decree, prohibited each corporate defendant linen supplier [1]

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[1] The corporate defendants include Martin Linen Co. and Texas Sanitary Towel Supply Corp. (Cascade Linen Service). Tex-Mart Corp., which had been named as a defendant in

(collectively referred to herein as "Martin"), from threatening, coercing, inducing or attempting to induce any linen rental supplier to refrain from furnishing linen supplies to any customer. The contempt argument centers on the interpretation and subsequent application to be given this prohibition in relation to Martin's alleged activities.

The appellate jurisdiction problem is difficult. Under the Expediting Act, the Supreme Court has exclusive jurisdiction of appeals from final judgments in every civil action wherein the United States is complainant.[2] Under the Criminal Appeals Act, the Court of Appeals has jurisdiction in a criminal case to review a decision, judgment or order dismissing an indictment or information except where the double jeopardy clause of the Constitution prohibits further prosecution. A criminal contempt prosecution in an antitrust case has been held to be a "criminal case"

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the original complaint and consent decree, was not named as respondent in the petitions. Respondent William B. Troy is included because he is the controlling stockholder and president of both Martin Linen Supply and Cascade Linen Service.

[2] Section 2 of the Expediting Act, as amended (15 U.S.C.A. § 29) provides:

> In every civil action brought in any district court of the United States under [the antitrust laws], wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court.
>
> Tidewater Oil v. United States, 409 U.S. 151, 93 S.Ct. 408, 34 L.Ed.2d 375 (1972).

within the meaning of 18 U.S.C.A. § 3731.[3] United States v. Goldman, 277 U.S. 229, 48 S.Ct. 486, 72 L.Ed. 862 (1928).

At bar is an appeal from a criminal contempt proceeding over which we have review jurisdiction, and an appeal from a civil contempt proceeding which, standing alone, is beyond our jurisdiction. To further complicate the jurisdictional picture, the District Court entered a separate order "construing" the final antitrust judgment in the civil suit. Although Martin contends that this construction order was a "final judgment" within the Expediting Act, thereby precluding review by our Court, we reason that the construction order is actually a part of the contempt proceedings and should be handled in the same manner as if it were a ruling within the context of a contempt proceeding. Since we have jurisdiction over the criminal contempt appeal, we will additionally review the civil contempt appeal on the rationale of judicial economy found in cross-claim, pendant and ancillary jurisdiction. To hold otherwise would require the same parties to litigate basi-

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[3] 18 U.S.C.A. § 3731 states

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more courts, except that no appeal shall lie where the do e jeopardy clause of the United States Constitution prohibits further prosecution.
>
> . . .
>
> The provisions of this section shall be liberally construed to effectuate its purposes.

cally the same issues in two different courts at the same time.

The Proceedings Below

In 1969, the United States filed a civil complaint in the District Court alleging that Martin restrained trade in violation of the Sherman Act, 15 U.S.C.A. § 1 et seq., with respect to the business of furnishing linen supplies in the state of Texas. In June, 1969, after negotiation, a consent decree was entered as final judgment in the suit.

In December, 1971, the United States filed the separate civil and criminal contempt petitions under review alleging violations of Section V(A)(1) of the consent decree. That Section provides

> Each corporate defendant is enjoined and restrained from, directly or indirectly:
>
> (A) threatening, coercing, inducing or attempting to induce:
>
> (1) Any linen rental supplier to refrain while in business, from furnishing linen supplies to any customer . . . .

The activities which the Government allege violated the consent decree revolve around Martin's attempts to exact reciprocal agreements from other linen suppliers not to compete for Martin's customers, backed up by warnings of economic reprisals.

After full pre-trial discovery, Martin filed a petition in the original antitrust proceeding for construction of the above Section.[4] The District Court determined that the allegations by the Government centered on Martin's activities aimed at recoupment of its own former customers and retaliations against competitors who solicited its customers. The Court concluded that Section V(A)(1) of the consent decree does not prevent Martin from threatening competitors with economic reprisals to persuade them to refrain from soliciting Martin's customers.[5]

Subsequent to the entry of the construction order and based thereon, the District Court dismissed the criminal and civil contempt petitions against Martin.

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[4] Jurisdiction was retained under Section X of the consent decree:

> Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or the carrying out of this Final Judgment, for the modification or termination of any of the provisions hereof for the purpose of enabling the plaintiff to apply to this Court for the enforcement of compliance herewith and for the punishment of violations hereof.

[5] Accordingly the Court finds:

> 1. The provisions of Section V(A)(1) do not prohibit Martin and Cascade from recouping business lost to competitors, from engaging in price wars and retaliatory sales campaigns to effect such recoupment, and from threatening to engage in those activities.
>
> 2. None of the activities of Defendants charged as violations of Section V(A)(1) in Paragraphs 10, 11, 12 and 13 of the Contempt Petitions and in the Supplementary Papers, violate the injunctions of that Section.

The Construction Order

Martin contends that the construction order interpreting a provision of the antitrust consent decree was a final judgment in a civil action and that, since the United States was the complainant, appeal lies only to the Supreme Court under the Expediting Act. The construction order, however, was initiated, viewed in light of, and decided upon the allegations of the contempt petitions. Although the application for construction of the antitrust decree and the construction order bore the caption and docket number of the contempt proceedings, the application was made after the date for the trial of the contempt charges had been set. It was made to the District Judge who was to hear the contempt petitions and not to the District Judge who entered the consent decree in the original antitrust suit. The Memorandum of Points and Authorities accompanying the application referred to the charges in the contempt petitions numerously and stated that the interpretation urged by the Government "in the pending contempt proceedings" would have adverse consequences. Immediate construction was urged in order to "narrow the factual issues of the pending contempt petition trials" and provide a basis for "reappraisal of the entire contempt proceedings and their termination or other disposition without trial."

The District Judge acknowledged in his opinion and order that the application was made "at this time because of the pendency of criminal and civil

contempt proceedings . . . ." After interpreting Section V(A)(1) of the consent decree, he found that the activities alleged in the contempt petitions and particularized in supplementary papers did not violate the Section. Three weeks later, on June 12, 1972, the District Court dismissed the contempt petitions in accordance "with this Court's Memorandum Opinion dated May 18, 1972, in Civil Action No. SA-69-C4-114 [the original antitrust suit]."

It is evident the construction order was a ruling integral with the contempt proceedings, and not a final judgment within the meaning of the Expediting Act. *See* United States v. Indrelunas, 411 U.S. 216, 93 S.Ct. 1562, 36 L.Ed.2d 202 (1973). To hold otherwise would allow the captioning of the application and construction order to override the substance of the ruling. United States v. Jorn, 400 U.S. 470, 478 n.7, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971); United States v. Sisson, 399 U.S. 267, 279 n. 7, 90 S.Ct. 2117, 26 L.Ed.2d 608 (1970); United States v. Hark, 320 U.S. 531, 536, 64 S.Ct. 359, 88 L.Ed. 290 (1944).

We hold that we have jurisdiction to review the construction order in connection with any review jurisdiction we have of the contempt proceedings.

Double Jeopardy

Although admitting that we have jurisdiction to review criminal contempt proceedings, Martin contends that the dismissal of the criminal contempt petition in this case was tantamount to an acquittal and that the double jeopardy clause of the Constitu-

tion would prevent a trial in the event we reversed the District Court. If such were the case, a review would be inappropriate. *See* United States v. Sisson, 399 U.S. 267, 90 S.Ct. 2117, 26 L.Ed.2d 608 (1970).

Martin bases its claim on the extensive pre-trial discovery which it reasons confronted the Court with the merits of the Government's claims. Jeopardy is not always an easy concept to determine. "[A] defendant is placed in jeopardy in a criminal proceeding once the defendant is put to trial before the trier of facts, whether the trier be a jury or a judge." United States v. Jorn, 400 U.S. 470, 479, 91 S.Ct. 547, 554, 27 L.Ed.2d 543 (1971). In the case of a jury trial, a defendant is deemed to have been put in jeopardy when the jury is empanelled and sworn. Illinois v. Somerville, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973); Downum v. United States, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963). In a non-jury trial, jeopardy attaches when the court begins hearing evidence. Hunter v. Wade, 336 U.S. 684, 69 S.Ct. 834, 93 L.Ed. 974 (1949).

The mere arraignment and pleading to an indictment or the conduct of a preliminary examination does not place the defendant in jeopardy. Collins v. Loisel, 262 U.S. 426, 429, 43 S.Ct. 618, 67 L.Ed. 1062 (1923); Bassing v. Cady, 208 U.S. 386, 391-392, 28 S.Ct. 392, 52 L.Ed. 540 (1908). Nor does the dismissal on a *nolle prosequi* when the witnesses have been sworn but before any have testified. Newman v. United States, 133 U.S.App.D.C. 271, 410 F.2d 259 (1969).

The Supreme Court has admonished us, however, to avoid any rigid rule and evaluate each case according to its facts. Illinois v. Somerville, *supra*. Indeed, this Court has noted the absence of fixed rules by which to measure an individual case. McNeal v. Hollowell, 481 F.2d 1145 (5th Cir. 1973).

In the case at bar the trial was admittedly in the pre-trial stages. It is true that the Government disclosed the nature of its case in the extensive pre-trial procedures ordered by the District Judge, but this did not commence a "hearing" of the evidence. The trial had not yet begun. Martin was never in jeopardy because it is "when the trial commences . . . that the constitutional policies underpinning the Fifth Amendment's guarantee are implicated . . . ." United States v. Jorn, *supra*, 400 U.S., at 480, 91 S.Ct., at 555.

We find the authority relied upon by Martin to be inapplicable. United States v. Findley, 439 F.2d 970 (1st Cir. 1971), United States v. Ponto, 454 F.2d 657 (7th Cir. 1971), United States v. Grochowski, 454 F.2d 655 (7th Cir. 1971), and United States v. Gustavson, 454 F.2d 677 (7th Cir. 1971), are "draft act" cases[6] which precluded appeal by the Government. They did not turn on the double jeopardy clause. All of the cases were decided under the Criminal Appeals Act, 18 U.S.C.A. § 3731, prior to its amendment by the Omnibus Crime Control Act of

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[6] Prosecution for refusal to submit to induction under the Military Selective Service Act of 1967, 50 U.S.C.A. App. § 462(a).

1970, § 14(a), 84 Stat. 1890. Under the prior Act, appeal was limited, not only by the double jeopardy clause, but also by statutory constraints. In deciding *Findley*, *Ponto*, *Grochowski*, and *Gustavson*, the Courts relied on these statutory constraints rather than the double jeopardy clause.

The First Circuit stated in *Findley* that the defendant had "[a]dmittedly . . . not formally been put in jeopardy. . . . Collectively we believe this was an approach not in terms of double jeopardy, but in terms of the kind of error section 3731 was intended to cover." 439 F.2d at 973.

The Seventh Circuit in *Ponto*, sitting *en banc*, discussed the applicability of the double jeopardy clause: only three members of the five-judge majority were persuaded that the Constitution barred an appeal. 454 F.2d at 663. The two members of the majority who had concurred in the result on statutory grounds did not join in the opinion on the constitutional grounds. 454 F.2d at 665. The four dissenting judges disagreed on both statutory and constitutional grounds: they felt that the constitutional guarantee against double jeopardy was inapplicable since the trial had not begun and jeopardy had not attached. 454 F.2d at 667-668. A similar distribution in the voting occurred in the companion case, *Gustavson*. There, only seven members heard the case *en banc*. Only five expressed an opinion on the double jeopardy issue. Of these, two voted that it barred the appeal and three voted that the clause was inapplicable.

Since the draft act cases were not decided on jeopardy grounds, they do not support Martin's argument that jeopardy has attached in this case.

Civil Contempt Jurisdiction

The civil contempt petition is virtually identical to the criminal contempt petition. Since the dismissal of the criminal contempt petition is appealable to this Court, the civil contempt petition may also be heard here on the basis of judicial economy.[7] Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 612-618, 86 S.Ct. 1018, 16 L.Ed.2d 131 (1966), is illustrative of the judicial economy reasoning. In that case, the Federal Maritime Commission entered a reparation order directing a carrier to pay damages to a shipper. Both the carrier and the shipper appealed, each intervening in the appeal of the other. The Court of Appeals had jurisdiction to review the shipper's claim for an increase in damages, but did not have jurisdiction over the carrier's appeal which properly lay in the District Court through an enforcement proceeding by the shipper. The Supreme Court held that the Court of Appeals could properly review both appeals.

> With the jurisdiction of the Court of Appeals properly invoked by the shipper, there is, there-

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[7] The rationale of judicial economy to prevent duplicity in the federal system has precedent in the policy underlying cross-claims, pendant and ancillary jurisdiction. Moore v. New York Cotton Exchange, 270 U.S. 593, 46 S.Ct. 367, 70 L.Ed. 750 (1926); Smith Petroleum Service, Inc. v. Monsanto Chemical Co., 420 F.2d 1103, 1113-1115 (5th Cir. 1970); 2A Moore, Federal Practice, ¶ 8.07[5] (2d ed. 1972).

fore, every reason to permit the carrier not only to litigate the amount of the reparation order but also to insist upon a determination of the validity of the Commission's order, both with respect to the carrier's violation of the Act and with respect to the reparation award itself . . . . The minimal disadvantages resulting to the shipper from permitting the carrier to attack the reparation order are more than offset by the desirability of a prompt and efficient determination of the validity of the Commission's order . . . . And, once the carrier intervenes in the shipper's appeal, all the parties interested in the complete resolution of the validity of the Commission's order are before the court. In this situation it would make little sense to require the carrier to break off his argument short of its logical conclusion and relitigate it anew before a district court in an enforcement action.

383 U.S. at 616-617, 86 S.Ct. at 1024-1025.

Consideration of the appeals jointly in the case at bar is supported by the holding in two kinds of cases. First, in cases arising under the former Criminal Appeals Act, the Supreme Court required the Court of Appeals to review both grounds if the District Court's ruling was on alternative grounds, one appealable under the statute to the Supreme Court and the other to the Court of Appeals. United States v. Swift & Co., 318 U.S. 442, 444-445, 63 S.Ct. 684, 87 L.Ed. 889 (1943). Second, in cases involving a single order for civil and criminal contempt in which the Supreme Court has held that the criminal aspect of the order

controls for purposes of determining the procedure on appeal. *See* Union Tool Co. v. Wilson, 259 U.S. 107, 110, 42 S.Ct. 427, 66 L.Ed. 848 (1922) (cross writ); In re Merchants' Stock & Grain Co., 223 U.S. 639, 32 S.Ct. 339, 56 L.Ed. 584 (1912) (contempt decree containing both remedial and punitive provisions).

Without deciding whether we would have jurisdiction to review the civil contempt proceeding were it standing alone or were it substantially different than the criminal petition, we hold that we have jurisdiction to review the dismissal under the facts of this case.

Contempt Charge

At this juncture it is necessary to review the language of Section V(A)(1) of the consent decree:

V.

Each corporate defendant is enjoined and restrained from directly or indirectly:

(A) Threatening, coercing, inducing or attempting to induce:

(1) Any linen rental supplier to refrain, while in business, from furnishing linen supplies to any customer . . . .

A consent decree is the manifestation of a negotiated settlement where the defendants in the original suit relinquished their right to litigate the issues of antitrust liability, relying fully on the decree terms. *See* United States v. Armour, 402 U.S. 673, 681-683,

91 S.Ct. 1752, 29 L.Ed.2d 256 (1971). It is necessary to look to the consent decree in its entirety to ascertain the meaning of the various sections as intended by the parties. United States v. Atlantic Rfg. Co., 360 U.S. 19, 22, 79 S.Ct. 944, 3 L.Ed.2d 1054 (1959). In so doing the trial court and this Court must give weight to the plain meaning of the words used. United States v. Armour, *supra* 402 U.S. at 682, 91 S.Ct. 1752. This caveat works to the protection of both parties.

Relying on the plain meaning of the words, the thrust of Section V(A)(1) is to prohibit Martin from engaging in activity which is aimed at causing any linen supplier to refrain from furnishing linen supplies to any customer. "Causing any linen supplier to refrain" is the key phrase of the section. The method used to procure the forebearance from competition is secondary: threats, coercion, and inducements by Martin are prohibited by V(A)(1) if they are aimed at a competitor with the intent to have that competitor refrain from competing with Martin.

The Government alleged that the following activities were violative of Section V(A)(1):

> threats of recoupment, threats of price wars and threats of retaliatory sales campaigns to induce competitors to enter into reciprocal agreements not to compete for customers, and to refrain from soliciting and taking customers from Martin . . . .

The District Court, after addressing itself to these allegations, held that "soliciting," "competing," and

"taking" were not synonymous with "furnishing linen supplies." "Furnishing linen supplies" was limited to delivering linen supplies. By so defining the phrase, none of the activity alleged by the Government was within the prohibition of Section V(A)(1) since the allegations were not addressed to furnishing linen supplies.

In examining the entire consent decree, however, the word "furnishing" appears in several different sections.[8] This repeated use of the words "furnish" or

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[8] Section II(c):

> "Linen rental supply business" means the business of *furnishing* clean linen supplies;

Section IV:

> Each defendant is enjoined and restrained from entering into, adhering to, enforcing or claiming any rights under any contract, agreement, understanding, plan or program with any person, not owned or controlled by such defendant, to directly or indirectly:
>
> (A) Fix, determine, maintain, stabilize or adhere to prices, discounts, or terms or conditions of sale, for the *furnishing* of any linen supplies to any third person;
>
> (B) Divide, allocate or apportion markets, territories or customers for the furnishing of any linen supplies or otherwise restrict competition between or among linen rental suppliers;
>
> (C) Cause any seller of linen supplies to boycott or refuse to sell linen supplies to any linen rental supplier;
>
> . . . .

Section V(G):

> Discussing or exchanging with any linen rental supplier, prices or price lists for the *furnishing* of linen supplies to any customer, or exchanging with, *furnishing* to or receiving from any linen rental supplier or linen

"furnishing" in conjunction with the "linen supplies" indicates that the words are used collectively in this decree to describe the business in which the respondents are engaged. The words "furnish linen supplies" are used in the same manner in Section V(A)(1) and accordingly that section should be interpreted to mean that the defendants are prohibited from using threats, coercion and inducements to persuade their competitors to refrain from "doing business" with any customer.

Next, the District Court looked at the methods alleged by the Government to have been used by Martin. Finding that they centered on recoupment and retaliation, the Court stated that Martin may recoup business lost to competitors "by any means, including below cost prices, lump sum cash payments, loans, free services, gratuities and other inducements . . ." It was a simple step for the Court to conclude that Martin "may also say, in advance, that they will

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rental suppliers, any list of customers or customer accounts served by any linen rental supplier; . . . .

Section VI:

Each corporate defendant is enjoined and restrained from *furnishing* or offering or threatening to *furnish* linen supplies to a customer or potential customer on terms or conditions which involve below cost prices, lump sum cash payments to the customer, loans (other than bona fide loans by a defendant to its then existing customers), free service, gratuities or other similar inducements to obtain a contract or renewal of a contract for the *furnishing* of linen supplies, for the purpose or with the effect of eliminating a competitor or competitors.

engage in these same activities. The speculative effect of verbalization cannot be different than that of the deeds verbalized." As a consequence of this reasoning, the District Court found:

> 1. The provisions of Section V(A)(1) do not prohibit Martin and Cascade from recouping business lost to competitors, from engaging in price wars and retaliatory sales campaigns to effect such recoupment, and from threatening to engage in those activities.

The activities of recoupment and retaliation are not *per se* violations of Section V(A)(1). They are violations, however, if their announced purpose is to cause Martin's competitors to refrain from competing, since the Section prohibits activities which "directly or indirectly" attempt "to induce" competitors "*to refrain*" from doing business.

It may be acceptable, as the District Court found, for Martin to engage in activity to recoup business. There is a difference, however, in activities of recoupment aimed at the customers and the threats of recoupment aimed at the competitors. We are mindful of the fact that recoupment practices may have the side effect of discouraging competition. Such flows from the normal course of business. But the use of threats directed at competitors to restrain competition, or to obtain reciprocal noncompetitive agreements, as the Government alleges, goes to the heart of the antitrust problem. Such activity was recognized and prohibited by Section V(A)(1).

The District Court concluded that the alleged activities by Martin against competitors were unsuccessful. The Court accepted tables submitted by Martin "showing that for more than three years there has been a constant interchange of accounts between Martin . . . and some one hundred competitors in the State of Texas." This information is not dispositive of the issue: it is irrelevant under Section V(A)(1) whether or not Martin's competitors were actually induced to refrain from competing. The issue is whether Martin either directly or indirectly threatened, coerced, induced, or attempted to induce such action.

Assuming that the allegations by the Government in the contempt petitions and supplementary papers are factually true, Martin attempted to engage other linen suppliers in noncompetitive agreements and attempted to curtail competition under threats, corecion and inducements of retaliatory sales campaigns. Such alleged activity aimed at restraining competition is a *prima facie* violation of Section V(A)(1).

We have only assumed, as did the District Court, that the allegations are true. The District Court must now address the factual issues in the case. We remand for such purpose.

Reversed and remanded.

APPENDIX D

U. S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA-69-CA-114

UNITED STATES

v.

MARTIN LINEN SUPPLY CO., TEX-MART CORP.,
TEXAS SANITARY TOWEL SUPPLY CORP.,
and WILLIAM B. TROY

Filed May 18, 1972

Memorandum Opinion and Order

Three Defendants have applied for construction of a single section of the Final Judgment ("Judgment") entered in this civil antitrust action upon consent of the parties on June 2, 1969. They move under Section X thereof which provides:

"X.

> Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or the carrying out of this Final Judgment, for the modification or termination of any of the provisions hereof for the purpose of enabling the plaintiff to apply to this Court for the enforcement of compliance

herewith and for the punishment of violations hereof."

The application is made at this time because of the pendency of criminal and civil contempt proceedings charging that the applying Defendants, Martin Linen Supply Company ("Martin"), Texas Sanitary Towel Supply Corp. ("Cascade") and William B. Troy, President of Martin and Cascade, have wilfully, deliberately and contumaciously violated certain of the provisions of the Judgment.

The principal charge in the Criminal and Civil Contempt Petitions is stated in Paragraph 10 of each Petition. That Paragraph asserts that applying Defendants "have knowingly and wilfully violated Section V(A)(1) of the Judgment by threatening, coercing, inducing and attempting to induce competitors to refrain from soliciting business from linen supply customers of Martin and Cascade, by conducting retaliatory sales campaigns and threatening such campaigns as hereinafter described." Paragraphs 11, 12 and 13 of the Petitions allege specific conduct embraced within the foregoing general charge. This specification of conduct has been expanded and stated in more detail by Plaintiff during the course of pretrial proceedings in "Answers of United States of America to Interrogatories and Request for Production of Documents by Respondents," "Bill of Particulars" and "Supplement to Voluntary Bill of Particulars" ("Supplementary Papers").

The nature of the conduct the petitions describe as violative of Section V(A)(1) is summarized in Paragraph 11 of each Petition which reads as follows:

> "11. In furtherance of their efforts to threaten, coerce, and induce competitors to refrain from soliciting business from linen rental users who are customers of Martin and Cascade, the respondents have, among other things:
>
> "(a) Discussed with and communicated to competitors, directly and indirectly, the fact that respondents would recoup all business that the competitor took from respondents;
>
> "(b) Prepared and coordinated statistical records of all business lost to and won from each of their competitors ("Competitive Standing Book") to determine those competitors against whom retaliatory sales campaigns should be started; and
>
> "(c) Conducted the retaliatory sales campaigns described in Paragraphs 12 and 13 hereof."

On this application Defendants assert that Judgment Section V(A)(1) does not prohibit this kind of activity and ask the Court to so rule. They urge that if they are correct in this respect, construction of the Judgment at this time will substantially limit the factual issues to be litigated in the forthcoming contempt trials. In exercise of the judicial power retained in Section X of the Judgment the Court has entertained this application and enters its decision in

the above entitled civil action, not in the pending contempt proceedings.

The arguments of both sides on this application have been exhaustively briefed by the parties and vigorously argued orally. The Court has carefully considered all those briefs and oral arguments.

The parties agree that for the purpose of construing the scope and application of Section V(A)(1) the Court must assume that the allegations in the Contempt Petitions and Supplementary Papers charging violation of that Section are factually true. The Court has made that assumption.

Section V(A)(1) reads:

"V.

"Each corporate defendant is enjoined and restrained from directly or indirectly:

"(A) Threatening, coercing, inducing or attempting to induce:

"(1) Any linen rental supplier to refrain, while in business, from furnishing linen supplies to any customer, ..."

Plaintiff's initial contention in opposing the construction sought by defendants was that this language clearly restrains Martin and Cascade from using, as well as threatening to use, lower prices, discriminatory prices, free services and other inducements to solicit and take customers from competitors who take customers from Martin and Cascade. Plaintiff retreated from this position to the extent of conceding that without violating the injunction of Section V

(A)(1) Martin and Cascade unilaterally may recoup business lost to competitors and that for this purpose they may engage in price wars and retaliatory sales campaigns. That concession is in accordance with accepted law. See *United States* v. *Borden Co.* [1953 TRADE CASES ¶ 67,754], 111 F. Supp. 562 (N.D. Ill. 1953) affirmed in relevant part [1954 TRADE CASES ¶ 67,754], 347 U.S. 514 (1954). This Court construes such recoupment, price wars and sales campaigns to embrace the use of lower prices, discriminatory prices, free service and other inducements not prohibited by other provisions of the Judgment or by the antitrust laws. After thus cutting down the activities claimed to be violative of Section V(A)(1) to threats of recoupment, threats of price wars and threats of retaliatory sales campaigns, Plaintiff added still one more concept to its view of the scope of Section V (A)(1). The final position taken by Plaintiff on this application is that Martin and Cascade by seeking to exact from their competitors reciprocal agreements not to compete for customers, backed up by warnings of economic reprisals, violate the letter and purpose of Section V(A)(1) of the Judgment.

The principles of construction the Court must follow here are time honored and clear. They have been restated by the Supreme Court most recently in *United States* v. *Armour Co.*, 402 U.S. 673 (1971).

At the outset we must remember that the Court has before it for construction a provision of a final judgment formulated in the course of negotiations

between the parties and entered on their consent. In those negotiations Defendants have bargained away their Constitutional right to litigate the issues of antitrust liability relying fully on the Judgment terms to which they have agreed.[1] The Second Circuit has noted: "It is important to the obtaining of consent decrees, on which the effective enforcement of the antitrust laws depend in no small degree, that the defendants who sign them should know that these will not be stretched beyond their terms." [2]

If the language of Section V(A)(1), standing alone, is clear and unambiguous the reach of that Section must be determined solely from the words in which its provisions are couched.[3] Those words specifically enjoin defendants from threatening, coercing, inducing or attempting to induce a competitor to refrain, while in business, *from furnishing linen supplies to any customer*. Plaintiff urges the Court to find that the emphasized phrase prohibits Martin and Cascade from utilizing unilateral threats of recoupment, threats of price wars and threats of retaliatory sales campaigns to induce competitors to enter into reciprocal agreements not to compete for customers, and to refrain from soliciting and taking customers from Martin and Cascade. The Court can so find only

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[1] *Armour, supra,* at p. 682.

[2] *United States* v. *American Society of Composers, Authors & Publishers,* 331 F. 2d 117, 123-124 (2nd Cir. 1964) cert. den., 377 U.S. 977 (1964).

[3] *Armour, supra,* at p. 682.

if in ordinary usage and common understanding "competing," "soliciting" and "taking" are synonymous with "furnishing." They are not so synonymous.

In relation to customers, the word "furnish" is the equivalent of "serve". It means to provide, supply or give service to. There is nothing in any dictionary or other definition of "furnishing" to suggest that "furnishing linen supplies" is a broader term embracing the additional unrelated concepts of soliciting linen supply customers, competing for linen supply customers or taking linen supply customers. "Solicit," with respect to any customers, means canvass, court, woo, seek and bid for. With respect to customers "compete" means to vie for or enter into competition with a business rival for. "Take," with respect to customers, is a synonym for acquire, get, obtain, secure and procure. All of the activities signified by these latter terms are distinct from and far beyond the scope of the limited conduct described by the word "furnishing". Had the parties intended by the provisions of Section V(A)(1) to formulate an injunction against inducing or threatening to induce competitors to refrain from soliciting the customers of Martin and Cascade; or to refrain from competing with Martin and Cascade for the business of their customers; or to refrain from taking customers away from Martin and Cascade, there are words other than "furnishing" which they could have used to express any such intention clearly and unmistakably. The parties used none of those words. The Court may not stretch "furnishing" beyond its ordinary and gen-

erally understood meaning to embrace the different and distinct conduct Plaintiff would like to read into that term. "If the parties had agreed to such a prohibition they could have chosen language that would have established the sort of prohibition the Government now seeks." *

When Section V(A)(1) is read together with Section VI it is apparent that the former does not prohibit unilateral threats by Martin and Cascade to recoup by any means, including below cost prices, lump sum cash payments, loans, free service, gratuities and other inducements, business these firms lose to competitors.

Defendants have presented in the Affidavit of Mervin C. Pollak, Esq. the evolution in negotiation of the provisions of Section V(A)(1). Plaintiff has argued against, but has not refuted, the facts alleged in that Affidavit. The Court is concerned with this evolution only to the extent that it shows Section V(A)(1) did have a specific and limited purpose and that this purpose was different from that now urged by Plaintiff.

There can be no distinction in fact between the information conveyed to competitors by a general unilaterally followed policy of recoupment and retaliation and a public or private communication of that policy. Since Plaintiff has conceded that Martin and Cascade may properly engage in these competitive activities originally claimed by Plaintiff to be

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* *Armour, supra* p. 681.

violations of Section V(A)(1) because of their theoretical, coercive and inhibiting effect on competitors, it is clear that Cascade and Martin may also say, in advance, that they will engage in these same activities. The speculative effect of verbalization cannot be different than that of the deeds verbalized.

Plaintiff has admitted in its briefs on this application that in fact the competitors of Martin and Cascade have not been dissuaded by any of the practices charged from continuing to compete with Martin and Cascade. Defendants have submitted undisputed figures showing that for more than three years there has been a constant interchange of accounts between Martin and Cascade and some one hundred competitors in the State of Texas. This is a strong picture of competition which belies the curtailment of competition Plaintiff fears theoretically could result from the recoupment and retaliatory threats charged against Martin and Cascade.

For these practical reasons the Court's inability to find in the provisions of Section V(A)(1) the prohibitions Plaintiff would like to find there does no violence to antitrust principles. It has long been basic that inquiry into antitrust legality is not mechanical or artificial. *Appalachian Coals, Inc.* v. *United States* [1932-1939 TRADE CASES ¶ 55,025], 288 U.S. 344, 360 (1933). All such inquiry is directed at the substance of challenged conduct, not its form. *United States* v. *Masonite Corp.* [1940-1943 TRADE CASES ¶ 56,209], 316 U.S. 265, 278 (1942).

If Defendants were to be hampered by the restrictions Plaintiff seeks to impose upon their competitive conduct under Section V(A)(1) they would soon be marked for extinction by predatory competitors, including those aggressive enough to lodge the complaints on which Plaintiff has acted in the contempt proceedings. Effective competition from Martin and Cascade would be eliminated and public users of linen rental service in Texas would suffer from that elimination. No antitrust judgment should be construed to have such an anticompetitive effect unless the clear and unavoidable mandate of its language leaves a Court with no other choice and no alternative construction. Section V(A)(1) has no such compelling mandate.

It is fundamental that the provisions of Section V(A)(1) represent "an agreement by the parties which the Court cannot expand or contract." [5] With Mr. Justice Marshall the Court here is compelled to say that even if the construction sought by Plaintiff *were* "in keeping with the purposes of the antitrust laws, we do not believe it is supported by the terms of the consent decree under which it is sought." [6] In *United States* v. *Atlantic Refining Co.*, 360 U.S. 19 (1959) the Supreme Court declined, under the guise of interpretation, to substantially change a decree "to which the parties consented without adjudication of

[5] See *Artvale, Inc.* v. *Rugby Fabrics Corp.*, 303 F.2d 283, 284 (2nd Cir., 1962).

[6] *Armour, supra,* at p. 683.

the issues" [7] merely because "another reading might seem more consistent with the Government's reasons for entering into the agreement in the first place." [8]

Accordingly the Court finds:

1. The provisions of Section V(A)(1) do not prohibit Martin and Cascade from recouping business lost to competitors, from engaging in price wars and retaliatory sales campaigns to effect such recoupment, and from threatening to engage in those activities.

2. None of the activities of Defendants charged as violations of Section V(A)(1) in Paragraphs 10, 11, 12 and 13 of the Contempt Petitions and in the Supplementary Papers, violate the injunctions of that Section.

It Is So Ordered.

[7] *Atlantic, supra,* at p. 23.

[8] *Id.*, at p. 24.

APPENDIX E

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

[Filed Apr. 24, 1975]

SA 71 CR 419

UNITED STATES OF AMERICA

v.

MARTIN LINEN SUPPLY COMPANY, TEXAS SANITARY TOWEL SUPPLY CORP. and WILLIAM B. TROY

JUDGMENT OF ACQUITTAL OF
MARTIN LINEN SUPPLY COMPANY

On the 18th day of February, 1975, trial of this matter was commenced before a Jury upon the plea of not guilty by Respondent, MARTIN LINEN SUPPLY COMPANY, to the offense of criminal contempt of this Court arising from an alleged violation of the Consent Decree ("Final Judgment") entered in the case of *United States of America* v. *Martin Linen Supply Company, et al.*, Civil Action No. SA-69-CA-114, on June 2, 1969.

Thereafter, MARTIN LINEN SUPPLY COMPANY timely filed its Motion for Judgment of Acquittal at the close of all the evidence in this cause and after considering all of the evidence adduced on

the trial hereof and all of said motions filed herein having been carefully considered by the Court, the Court finds that the grounds set forth in that Motion are good and valid and that the Government has failed to prove the material allegations beyond a reasonable doubt; that further this defendant should be found "not guilty".

It is accordingly ADJUDGED that Respondent, MARTIN LINEN SUPPLY COMPANY, is not guilty of the charges against it, and is hereby ACQUITED AND DISCHARGED as to all charges herein.

IT IS SO ORDERED that a certified copy of this Judgment be delivered by mail to counsel for Respondent, MARTIN LINEN SUPPLY COMPANY.

ENTERED this 22nd day of April, 1975.

/s/ John H. Wood, Jr.
JOHN H. WOOD, JR.
United States District Judge

APPENDIX F

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

[Filed Apr. 24, 1975]

SA 71 CR 419

UNITED STATES OF AMERICA

v.

MARTIN LINEN SUPPLY COMPANY, TEXAS SANITARY TOWEL SUPPLY CORP. and WILLIAM B. TROY

JUDGMENT OF ACQUITTAL OF
TEXAS SANITARY TOWEL
SUPPLY CORPORATION

On the 18th day of February, 1975, trial of this matter was commenced before a Jury upon the plea of not guilty by Respondent, TEXAS SANITARY TOWEL SUPPLY CORP., to the offense of criminal contempt of this Court arising from an alleged violation of the Consent Decree ("Final Judgment") entered in the case of *United States of America* v. *Martin Linen Supply Company, et al.*, Civil Action No. SA-69-CA-114, on June 2, 1969.

Thereafter, TEXAS SANITARY TOWEL SUPPLY CORP. timely filed its Motion for Judgment of

Acquital at the close of all the evidence in this cause and, after considering all of the evidence adduced on the trial hereof and all of said motions filed herein having been carefully considered by the Court, the Court finds that the grounds set forth in that Motion are good and valid and that the Government has failed to prove the material allegations beyond a reasonable doubt; that further this defendant should be found "not guilty".

It is accordingly ADJUDGED that Respondent, TEXAS SANITARY TOWEL SUPPLY CORP., is not guilty of the charges against it, and is hereby ACQUITED AND DISCHARGED as to all charges herein.

IT IS SO ORDERED that a certified copy of this Judgment be delivered by mail to counsel for Respondent, TEXAS SANITARY TOWEL SUPPLY CORP.

ENTERED this 22nd day of April, 1975.

/s/ John H. Wood, Jr.
JOHN H. WOOD, JR.
United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA69CA114

UNITED STATES

v.

MARTIN LINEN SUPPLY CO., TEX-MART CORP.,
TEXAS SANITARY TOWEL SUPPLY CORP.,
and WILLIAM B. TROY

Entered June 2, 1969

Final Judgment

SPEARS, D. J.: Plaintiff, United States of America, having filed its complaint herein, defendants having filed their answer thereto, and the plaintiff and the defendants having severally consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting evidence or an admission by any party signatory hereto with respect to any such issue;

Now, Therefore, before the taking of any testimony, and without trial or adjudication of any issue of fact or law herein, and upon consent of the parties as aforesaid, it is hereby

Ordered, Adjudged and Decreed, as follows:

I

This Court has jurisdiction of the subject matter of this action and of each of the parties hereto, and the complaint states claims upon which relief may be granted against the defendants and each of them under Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies", commonly known as the Sherman Act, as amended.

II

As used in this Final Judgment:

(A) "Person" means any individual, corporation, partnership, association, firm or other legal entity;

(B) "Linen Supply" or "linen supplies" means towels, swipe towels, continuous roll towels, napkins, table cloths or covers, sheets, pillow cases, aprons, bibs, chefs' pants, caps, jackets, ladies uniforms, skirts, gowns, bartender vests, coats, waitresses' vests, and similar items;

(C) "Linen rental supply business" means the business of furnishing clean linen supplies;

(D) "Linen rental supplier" means a person who rents clean linen supplies to customers or users:

III

The provisions of this Final Judgment applicable to any defendant shall apply to each such defendant, to its successors and assigns, to each of their respec-

tive officers, directors, agents, servants and employees, and to all persons in active concert or participation with any such defendant who shall have received actual notice of this Final Judgment by personal service or otherwise.

IV

Each defendant is enjoined and restrained from entering into, adhering to, enforcing or claiming any rights under any contract, agreement, understanding, plan or program with any person, not owned or controlled by such defendant, to directly or indirectly:

(A) Fix, determine, maintain, stabilize or adhere to prices, discounts, or terms or conditions of sale, for the furnishing of any linen supplies to any third person;

(B) Divide, allocate or apportion markets, territories or customers for the furnishing of any linen supplies or otherwise restrict competition between or among linen rental suppliers;

(C) Cause any seller of linen supplies to boycott or refuse to sell linen supplies to any linen rental supplier.

V

Each corporate defendant is enjoined and restrained from, directly or indirectly:

(A) Threatening, coercing, inducing or attempting to induce:

(1) Any linen rental supplier to refrain, while in business, from furnishing linen supplies to any customer, or

(2) Any officer, director, agent, servant or employee of any other linen rental supplier to divulge or make known to such defendant any customer lists or customer accounts known to such person by virtue of his employment by such other linen rental supplier.

(B) Threatening to put any linen rental supplier out of business;

(C) Enticing any employee of a linen rental supplier to take other employment with such defendant with the purpose and effect of hampering, injuring or prejudicing such linen rental supplier in its business;

(D) Knowingly making or causing to be made to any person any false report or false statement concerning the financial standing or business integrity of any linen rental supplier or that any linen rental supplier:

(1) is extending gifts or preferential prices to its customers, or

(2) Is about to cease business operations, or

(3) Is to be acquired by or merged with any linen rental supplier;

(E) Trailing or causing to be trailed the vehicle or vehicles, deliveryman or deliverymen of any other linen rental supplier;

(F) Temporarily augmenting or adding to its personnel in any trading area outside of the course

of a normal selling campaign for the purpose or with the effect of eliminating a competitor or competitors;

(G) Discussing or exchanging with any linen rental supplier, prices or price lists for the furnishing of linen supplies to any customer, or exchanging with, furnishing to or receiving from any linen rental supplier or linen rental suppliers, any list of customers or customer accounts served by any linen rental supplier; provided that subsections (A)(2) and (G) shall not prohibit:

(1) Any discussion or exchange of such information in connection with the bona fide negotiation of, or a contract for, the purchase or sale of a linen supply business, or

(2) Any industry representative from compiling such price information as may be necessary to the negotiation of a labor contract or to a governmental investigation or proceeding and using such information in general and composite form without identifying any of the prices gathered as those of any particular linen supplier, in connection with such negotiation, investigation or proceeding;

(H) Organizing or participating in any of the activities of, or of supporting, being a member of, or contributing anything of value to any group or association for linen rental suppliers, the purposes or activities of which are in any manner inconsistent with any of the provisions of this Final Judgment.

VI

Each corporate defendant is enjoined and restrained from furnishing or offering or threatening to furnish linen supplies to a customer or potential customer on terms or conditions which involve below cost prices, lump sum cash payments to the customer, loans (other than bona fide loans by a defendant to its then existing customers), free service, gratuities or other similar inducements to obtain a contract or renewal of a contract for the furnishing of linen supplies, for the purpose or with the effect of eliminating a competitor or competitors.

VII

Each of the corporate defendants and each of its shareholders, officers, directors and employees is enjoined for a period of three years from the date of the entry of this Final Judgment:

(A) From directly or indirectly making any form of capital contribution to, or increasing by investment or otherwise, the capital of defendant Martin Linen Supply Co.;

(B) From rendering, directly or indirectly, any form of financial assistance to or for the benefit of defendant Martin Linen Supply Co., including the making, guaranteeing or procuring, in any way, of loans, advances of money or extensions of credit on any basis, except the extension of short term trade credits customary and normal in the trade, and on non-discriminatory terms, in connection with the pur-

chase of linen supplies and related items from any defendant;

(C) From directly or indirectly making any form of capital contribution to, or increasing, by investment or otherwise, the capital of defendant Tex-Mart Corp., or rendering any form of financial assistance to or for the benefit of defendant Tex-Mart Corp. except the advancement or procurement of funds and/or financing which may be required to enable defendant Tex-Mart Corp. to purchase outstanding capital shares of defendant Martin Linen Supply Co., at any time owned by any shareholder or shareholders other than defendant Tex-Mart Corp.

VIII

(A) For a period of three years corporate defendants shall notify the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice at least thirty days prior to the date of a proposed acquisition of the stock, assets, or business of a linen rental supplier doing a volume of business in excess of four hundred dollars per week of the general terms of the proposed acquisition, including the name of the seller or sellers, and the volume of linen rental supply business done by the business to be acquired during the preceding twelve months;

(B) For the said three year period, on or before each April 1st, August 1st, November 1st and February 1st, each corporate defendant shall submit in writing to the said Assistant Attorney General the information specified in subdivision (A) of this section as to each acquisition by any corporate defendant of the stock, assets or business of a linen rental supplier, irrespective of the weekly volume thereof, consummated in the preceding three month period.

IX

For the purpose of securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division and on reasonable notice to any defendant, made to its principal office, be permitted subject to any legally recognized privilege (a) reasonable access during the office hours of such defendant to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of such defendant relating to any matters contained in this Final Judgment, and (b) subject to the reasonable convenience of such defendant and without restraint or interference from it, to interview officers or employees of such defendant, who may have counsel present, regarding any such matters. A defendant, upon the written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and upon reasonable notice made to its principal office, shall submit reports in writing with respect to any of the matters contained in this Final Judgment as may from time to time be necessary and requested for the enforcement of this Final Judgment. No information obtain-

ed by the means provided in this Section IX shall be divulged by any representative of the Department of Justice to any person except a duly authorized representative of the Executive Branch of the United States and except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

X

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or the carrying out of this Final Judgment, for the modification or termination of any of the provisions hereof for the purpose of enabling the plaintiff to apply to this Court for the enforcement of compliance herewith and for the punishment of violations hereof.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 216059 282

Supreme Court, U. S.
FILED
DEC 16 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 76-120

UNITED STATES OF AMERICA,
Petitioner

—*v.*—

MARTIN LINEN SUPPLY COMPANY AND
TEXAS SANITARY TOWEL SUPPLY CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED JULY 27, 1976
CERTIORARI GRANTED NOVEMBER 1, 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-120

UNITED STATES OF AMERICA,

Petitioner

—*v.*—

MARTIN LINEN SUPPLY COMPANY AND
TEXAS SANITARY TOWEL SUPPLY CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

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* A copy of the opinion of the court of appeals is reprinted as Appendix A to the petition for a writ of certiorari. Also reprinted in the petition, and not reproduced in this Appendix, are: the judgment of the court of appeals (Pet. App. 10a); a previous opinion of the court of appeals (Pet. App. 11a); the opinion of the district court dismissing the contempt petitions (Pet. App. 29a); the district court's judgments of acquittal (Pet. App. 40a and 42a); and the consent judgment in the original antitrust case (Pet. App. 44a).

RELEVANT DOCKET ENTRIES

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

12-09-71 Petition filed.

12-09-71 Order to Show Cause filed.

1-12-72 Motion for Order Directing the USA to File a Bill of Particulars and Points and Authorities in Support Thereof filed.

1-12-72 Motion for Discovery and Inspection Including Disclosure of all Evidence Favorable to Respondents, filed.

1-14-72 Certified Copy of Order ectendinf time to conduct discovery filed.

2-04-72 Government Bill of Particulars filed.

2-10-72 Hearing on all motions. Motion to Stay Discovery—Granted.

4-10-72 Hearing on Construction of Consent Decree. Case taken under advisement by Court.

5-24-72 Motion to Dismiss Criminal Contempt Petition as to Respondent William B. Troy filed.

5-30-72 Application for leave of Court to Dismiss the Remaining Counts of the Petitions filed.

6-12-72 ORDER dismissing charges of violations of Section V(A)(1) contained in paragraphs 10, 11, 12, and 13 filed.

7-05-72 Dismissal of Charges Without Prejudice filed.

7-12-72 Notice of Appeal filed.

8-21-72 All original papers in this case forwarded by mail to the U.S. Court of Appeals for the Fifth Circuit, New Orleans, Louisiana, this date.

11-02-73 Certified-true copy of Judgment, U.S. Court of Appeals, REVERSING the Court Order, and REMANDING the Cause, filed.

5-03-74 Petition by the U.S. for an Order to Show Cause Why the Respondents Should not be Found in Criminal Contempt filed.

5-9-74 Docket Call—Govt moved to consolidate civil and criminal cases.

5-13-74 ORDER to Show Cause (for all defts) filed.

7-26-74 Motion to Dismiss Portions of the Criminal Contempt Petition Charges as to Respondent William B. Troy filed.

8-15-74 Hearing on Pre-trial motions. Motion to dismiss Portions of Criminal Contempt Petition; carried forward to trial. Court feels that is case is a jury trial, Court will bifurcate trial and have criminal trial first.

8-26-74 Petitioner's Memo in Support of Govt's Submission That This Case be Heard by Jury filed.

2-18-75 PreTrial Conference held—Hearing on Motion to Strike—OVERRULED. Jury Selection made and jurors sworn and case to trial before Jury.

2-19-75 Trial continued—testimony on behalf of Govt continued—Gov't rests—Testimony for Defts begun—Defts rest—Both sides close—Jury excused.

2-20-75 Trial resumed—Closing arguments made—Charge of Court given—Jury retires.

2-20-75 Note No. 1., received from Jury at 3:30 P.M., filed.

2-20-75 Motion of Respt. Martin Linen Supply Co. for Judgment of Acquittal, filed.

2-20-75 Motion of Respt. Texas Sanitary Towel Supply Corp. for Judgment of Acquittal, filed.

2-20-75 Motion of Respt. Wm. B. Troy for Judgment of Acquittal, filed.

2-21-75 Jury continues deliberation—Jury returned Verdict of "Not Guilty" for Respt. William B. Troy, only,—Mistrial declared as to Defts Cascade and Martin.

2-21-75 Jurors excused finally.

2-21-75 Note No. 2, rec'd from Jury at 12:15 PM, filed.

2-27-75 Motion of Resp. Martin Linen Sup. Co. for Judg. of Acquittal, filed.

2-27-75 Motion of Resp. Tex. San. Towel Sup. Corp. for Judg. of Acquittal.

3-17-75 Petnr's Memo in Opposition to Motions for Judgments of Acquittal as to Martin Linen Supply Co., and Tex. San. Towel Sup. Corp.

3-26-75 Respondents' Rejoinder in Support of their Motions for Judgment of Acquittal, filed.

4-24-75 Judgment of Acquittal of Martin Linen Supply Co., filed.

4-24-75 Judgment of Acquittal of Tex. San. Towel Supply Corp., filed.

5-19-75 Notice of Appeal filed by USA (from Acquittal of Martin Linen & Texas Sanitary).

5-23-75 Ltr, US Atty, Requesting Withholding of Record on Appeal Temporarily filed.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

5-19-75 Notice of appeal filed.

7-30-75 Record on appeal filed.

2-5-76 Case argued (Houston).

6-21-76 Opinion rendered. Dismissed (ILG; Signed).

7-13-76 Jdgt. as Mdt. Issd. to Clerk

7-21-76 Record on Appeal Retd. to Clerk

7-19-76 Order of S.C.—Ext. to 8-20-76

7-30-76 Notice of Flg. of Cert. Pet. on 7-27-76

11-8-76 Order of S.C.—Granted 11-1-76

11-9-76 Preparing Proceedings on Certiorari (6 vol appendix).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO, TEXAS

Civil Action No. SA 69-CA-114

Civil Contempt Petition

Filed: Dec. 9, 1971

UNITED STATES OF AMERICA, PETITIONER

v.

MARTIN LINEN SUPPLY COMPANY, TEXAS SANITARY TOWEL SUPPLY CORP., AND WILLIAM B. TROY, RESPONDENTS

PETITION BY THE UNITED STATES FOR AN ORDER TO SHOW CAUSE WHY THE RESPONDENTS SHOULD NOT BE FOUND IN CIVIL CONTEMPT

The United States of America by its attorneys, acting under the direction of the Attorney General, presents this Petition for an order requiring the above-named respondents to show cause why they should not be found in civil contempt of this Court. The petitioner represents to the Court as follows:

I

PRIOR JUDGMENT OF THIS COURT

1. On April 30, 1969, petitioner filed in this Court Civil Action No. SA 69-CA-114, brought under Section 4 of the Sherman Act (15 U.S.C. § 4), charging that since at least 1963 the respondents had been engaged in a combination and conspiracy to restrain, to monopolize and to attempt to monopolize the trade of furnishing linen supplies in the State of Texas, in violation of Sections 1 and 2 of the Sherman Act.

2. On June 2, 1969, upon consent of the parties, a Final Judgment ("Judgment") was entered in this Court, in Civil Action No. SA 69-CA-114. A copy of this Judgment is annexed to this Petition and marked as Exhibit "A".

3. Section III of the Judgment provides:

> The provisions of this Final Judgment applicable to any defendant shall apply to each such defendant, to its successors and assigns, to each of their respective officers, directors, agents, servants and employees, and to all persons in active concert or participation with any such defendant who shall have received actual notice of this Final Judgment by personal service or otherwise.

4. Section X of the Judgment provides:

> Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or the carrying out of this Final Judgment, for the modification or termination of any of the provisions hereof for the purpose of enabling the plaintiff to apply to this Court for the enforcement of compliance herewith and for the punishment of violations hereof.

II

DESCRIPTION OF RESPONDENTS

5. Martin Linen Supply Company ("Martin") is hereby made a respondent. Martin is a corporation organized and existing under the laws of the State of Texas with its principal office in San Antonio, Texas. Martin supplies linens in and around several large cities in the States of Texas and Oklahoma. Martin was a defendant in Civil Action No. SA 69-CA-114 and is a party to the Judgment in that action.

6. Texas Sanitary Towel Supply Corp., doing business as Cascade Linen Service ("Cascade"), is hereby

made a respondent. Cascade is a corporation organized and existing under the laws of the State of New York with offices in Dallas, Texas. Cascade is a linen supplier doing business in the State of Texas and is affiliated through common ownership with the respondent Martin. Cascade was a defendant in Civil Action No. SA 69-CA-114 and is a party to the Judgment in that action.

7. William B. Troy, the controlling stockholder and president of both Martin and Cascade, is hereby made a respondent. Troy also actively participates in the ownership and control of many other linen supply companies doing business in various other areas of the United States. William B. Troy was a defendant in Civil Action No. SA 69-CA-114 and is a party to the Judgment in that action.

III

VIOLATIONS OF THE JUDGMENT ALLEGED

8. Petitioner alleges that the above-named respondents have knowingly disobeyed and violated, and are continuing to disobey and violate, orders and decrees of this Court as set forth in the Judgment and are in civil contempt of the authority of this Court, as a result, among others, of the respondents' acts set forth below:

A. *Section V(A)(1)*

9. Section V(A)(1) of the Judgment provides that:

> Each corporate defendant is enjoined and restrained from, directly or indirectly:
>
> (A) Threatening, coercing, inducing or attempting to induce:
>
> (1) Any linen rental supplier to refrain, while in business, from furnishing linen supplies to any customer, . . .

10. Petitioner alleges that since as early as 1969 and continuing to the date of filing this Petition, the respondents have violated Section V(A)(1) of the Judgment by threatening, coercing, inducing and attempting

to induce competitors to refrain from soliciting business from linen supply customers of Martin and Cascade, by conducting retaliatory sales campaigns and threatening such campaigns, as hereinafter described.

11. In furtherance of their efforts to threaten, coerce, and induce competitors to refrain from soliciting business from linen rental users who are customers of Martin and Cascade, the respondents have, among other things:

(a) Discussed with and communicated to competitors, directly and indirectly, the fact that respondents would recoup all business that the competitor took from respondents;

(b) Prepared and coordinated statistical records of all business lost to and won from each of their competitors ("Competitive Standing Book") to determine those competitors against whom retaliatory sales campaigns should be started; and

(c) Conducted the retaliatory sales campaigns described in Paragraphs 12 and 13 hereof.

12. The respondents have sought to coerce and induce Flake Uniform and Linen Supply ("Flake") of Wichita Falls, Texas, a competitive linen supplier, to refrain from soliciting customers of Cascade in the following manner:

(a) Sometime in mid-1970, Leo Latham, branch manager of Martin in Wichita Falls, Texas, threatened Leon Flake, president of Flake, that if Flake did not stop soliciting Cascade's customers in Dallas, Texas, Martin would wage a price war in Wichita Falls in order to regain sales lost by Cascade to Flake;

(b) On May 22 or June 15, 1970, Dan Sportsman, general manager of Martin, threatened Leon Flake that Martin would put him out of business;

(c) Sometime in early 1971, William B. Troy decided that Martin should launch a sales campaign against Flake in Wichita Falls, Texas, where both

Martin and Flake were doing business, in order to retaliate for those sales that Cascade had lost to Flake in Dallas, Texas; and

(d) Starting in April 1971, and continuing to date, Martin has conducted a retaliatory sales campaign against Flake both in Wichita Falls, Texas, and Lawton, Oklahoma, during which (1) salesmen of Martin have trailed Flake's delivery trucks in order to ascertain which csutomers they should solicit; (2) Martin has offered prices at and below the lowest prices it offers for services elsewhere in the State of Texas in order to win accounts from Flake; and (3) Martin has offered substantial amounts of free service in order to obtain business at Flake's expense.

13. The respondents have sought to coerce and induce Abilene Linen Supply Company ("Abilene") of Abilene, Texas, to refrain from soliciting customers of Martin in the following manner:

(a) In October 1969, after Abilene had obtained the Saga Food Service account which had previously been serviced by Martin, George Harrelson, a Martin branch manager in Abilene, Texas, told Don Wright, manager of Abilene, that he would "get even";

(b) Thereafter, Abilene lost business to Martin, in an amount in excess of the Saga Food Service account, through selective price cuts on the part of Martin; and

(c) On February 7, 1970, George Harrelson met with Don Wright and told him that if Abilene did not stop soliciting Martin's customers, he could expect more retaliation.

B. *Section V(B)*

14. Section V(B) of the Judgment provides that:

Each corporate defendant is enjoined and restrain from, directly or indirectly:

* * * *

(B) Threatening to put any linen rental supplier out of business;

15. Petitioner alleges that on May 22 or June 15, 1970, Dan Sportsman, general manager of Martin, made a telephone threat to Leon Flake, president of Flake, that Martin would put Flake out of business, in violation of Section V(B) of the Judgment.

C. *Section V(E)*

16. Section V(E) of the Judgment provides that:

Each corporate defendant is enjoined and restrained from, directly or indirectly:

* * * *

(E) Trailing or causing to be trailed the vehicle or vehicles, deliveryman or deliverymen of any other linen rental supplier;

17. Petitioner alleges that on July 12, 197[illegible], in Altus, Oklahoma, Garry Harris, a Martin salesman, was trailing a Flake truck in violation of Section V(E) of the Judgment.

D. *Section V(F)*

18. Section V(F) of the Judgment provides that:

Each corporate defendant is enjoined and restrained from, directly or indirectly:

* * * *

(F) Temporarily augmenting or adding to its personnel in any trading area outside of the course of a normal selling campaign for the purpose or with the effect of eliminating a competitor or competitors;

19. Petitioner alleges that respondents have violated Section V(F) of the Judgment by temporarily adding the following Martin salesmen to the Wichita Falls, Texas, and Lawton, Oklahoma trading area during the following periods:

(a)	Gary Harris	April 3—July 23, 1971
(b)	Max Welch	May 8—July 2, 1971
(c)	Dave Isbel	July 5, 1971—to at least August 3, 1971
(d)	Mark Sutphen	July 12, 1971—to at least August 3, 1971
(e)	Bob Davis	March 20, 1971—to at least August 3, 1971

20. The above-named individuals carried out the retaliatory sales campaign against Flake which is alleged in Paragraph 12(d) hereof, and which was conducted outside of a normal Martin selling campaign for the purpose of eliminating Flake as a competitor in the linen rental supply business in the Dallas, Texas trading area.

E. *Section VI*

21. Section VI of the Judgment provides that:

> Each corporate defendant is enjoined and restrained from furnishing or offering or threatening to furnish linen supplies to a customer or potential customer on terms or conditions which involve below cost prices, lump sum cash payments to the customer, loans (other than bona fide loans by a defendant to its then existing customers), free service, gratuities or other similar inducements to obtain a contract or renewal of a contract for the furnishing of linen supplies, for the purpose or with the effect of eliminating a competitor or competitors.

22. Petitioner alleges that respondents carried out in part the retaliatory sales campaign described in Paragraph 12(d) hereof by using offers of free service and other similar inducements in the Wichita Falls, Texas, and Lawton, Oklahoma trading area for the purpose of eliminating Flake as a competitor in the linen rental supply business in the Dallas, Texas trading area, in violation of Section VI of the Judgment.

PRAYER

WHEREFORE, the petitioner moves this Court to:

1. Issue an order directing each of the respondents to appear before this Court, at a time and place to be fixed in said order, to show cause why they should not be adjudged in civil contempt of this Court; and

THEREAFTER,

2. Issue an order adjudging that respondents have been in civil contempt of this Court's Judgment, and further:

(a) Issue an order that respondents forthwith cease and desist from carrying out retaliatory sales campaigns in the manner alleged herein;

(b) Issue an order that the respondents forthwith cease and desist from maintaining a statistical record by competitor of business won or lost;

(c) Impose an appropriate fine upon the corporate respondents Martin and Cascade for each day after this Court's order that said respondents fail to carry out the directions of this Court;

(d) Impose an appropriate fine and imprisonment upon the individual respondent William B. Troy for each day after this Court's order that said respondent fails to carry out the directions of this Court;

(e) Issue such further orders as the nature of the case may require and as the Court may deem just and proper to compel obedience to, and compliance with, the Judgment; and

(f) Grant to the petitioner the cost of this proceeding.

/s/ Richard W. McLaren
RICHARD W. MCLAREN
Assistant Attorney General

/s/ Baddia J. Rashid
BADDIA J. RASHID

/s/ Robert B. Hummel
ROBERT E. HUMMEL

/s/ Bernard M. Hollander
BERNARD M. HOLLANDER
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Washington, D.C. 20530

United States Attorney

/s/ L. Barry Costilo
L. BARRY COSTILO

/s/ Stephen F. Sonnett
STEPHEN F. SONNETT
Attorneys, Department of Justice
Washington, D.C. 20530

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO, TEXAS

Criminal No. SA 71CR 419

Supplement to Civil Action No. SA 69-CA-114

Criminal Contempt Petition

Filed: 12/9/71

UNITED STATES OF AMERICA, PETITIONER

v.

MARTIN LINEN SUPPLY COMPANY, TEXAS SANITARY TOWEL SUPPLY CORP., AND WILLIAM B. TROY, RESPONDENTS

PETITION BY THE UNITED STATES FOR AN ORDER TO SHOW CAUSE WHY THE RESPONDENTS SHOULD NOT BE FOUND IN CRIMINAL CONTEMPT

The United States of America by its attorneys, acting under the direction of the Attorney General, presents this Petition for an order requiring the above-named respondents to show cause why they should not be found in criminal contempt of this Court. The petitioner represents to the Court as follows:

I

PRIOR JUDGMENT OF THIS COURT

1. On April 30, 1969, petitioner filed in this Court Civil Action No. SA 69-CA-114, brought under Section 4 of the Sherman Act (15 U.S.C. § 4), charging that since at least 1963 the respondents had been engaged in a combination and conspiracy to restrain, to monopolize and to attempt to monopolize the trade of furnishing linen supplies in the State of Texas, in violation of Sections 1 and 2 of the Sherman Act.

2. On June 2, 1969, upon consent of the parties, a Final Judgment ("Judgment") was entered in this Court, in Civil Action No. SA 69-CA-114. A copy of this Judgment is annexed to this Petition and marked as Exhibit "A".

3. Section III of the Judgment provides:

> The provisions of this Final Judgment applicable to any defendant shall apply to each such defendant, to its successors and assigns, to each of their respective officers, directors, agents, servants and employees, and to all persons in active concert or participation with any such defendant who shall have received actual notice of this Final Judgment by personal service or otherwise.

4. Section X of the Judgment provides:

> Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or the carrying out of this Final Judgment, for the modification or termination of any of the provisions hereof for the purpose of enabling the plaintiff to apply to this Court for the enforcement of compliance herewith and for the punishment of violations hereof.

II

DESCRIPTION OF RESPONDENTS

5. Martin Linen Supply Company ("Martin"), is hereby made a respondent. Martin is a corporation organized and existing under the laws of the State of Texas with its principal office in San Antonio, Texas. Martin supplies linens in and around several large cities in the States of Texas and Oklahoma. Martin was a defendant in Civil Action No. SA 69-CA-114 and is a party to the Judgment in that action.

6. Texas Sanitary Towel Supply Corp., doing business as Cascade Linen Service ("Cascade"), is hereby made

a respondent. Cascade is a corporation organized and existing under the laws of the State of New York with offices in Dallas, Texas. Cascade is a linen supplier doing business in the State of Texas and is affiliated through common ownership with the respondent Martin. Cascade was a defendant in Civil Action No. SA 69-CA-114 and is a party to the Judgment in that action.

7. William B. Troy, the controlling stockholder and president of both Martin and Cascade, is hereby made a respondent. Troy also actively participates in the ownership and control of many other linen supply companies doing business in various other areas of the United States. William B. Troy was a defendant in Civil Action No. SA 69-CA-114 and is a party to the Judgment in that action.

III

VIOLATIONS OF THE JUDGMENT CHARGED

8. Petitioner charges that the above-named respondents have knowingly and willfully disobeyed and violated, and are continuing to knowingly and willfully disobey and violate, orders and decrees of this Court as set forth in the Judgment and are in criminal contempt of the authority of this Court, as a result, among others, of the respondents' acts set forth below:

A. *Section V(A)(1)*

9. Section V(A)(1) of the Judgment provides that:

> Each corporate defendant is enjoined and restrained from, directly or indirectly:
>
> (A) Threatening, coercing, inducing or attempting to induce:
>
> (1) Any linen rental supplier to refrain, while in business, from furnishing linen supplies to any customer, . . .

10. Petitioner charges that since as early as 1969 and continuing to the date of filing this Petition, the respondents have knowingly and willfully violated Sec-

tion V(A)(1) of the Judgment by threatening, coercing, inducing and attempting to induce competitors to refrain from soliciting business from linen supply customers of Martin and Cascade, by conducting retaliatory sales campaigns and threatening such campaigns, as hereinafter described.

11. In furtherance of their efforts to threaten, coerce, and induce competitors to refrain from soliciting business from linen rental users who are customers of Martin and Cascade, the respondents have, among other things:

(a) Discussed with and communicated to competitors, directly and indirectly, the fact that respondents would recoup all business that the competitor took from respondents;

(b) Prepared and coordinated statistical records of all business lost to and won from each of their competitors ("Competitive Standing Book") to determine those competitors against whom retaliatory sales campaigns should be started; and

(c) Conducted the retaliatory sales campaigns described in Paragraphs 12 and 13 hereof.

12. The respondents have sought to coerce and induce Flake Uniform and Linen Supply ("Flake") of Wichita Falls, Texas, a competitive linen supplier, to refrain from soliciting customers of Cascade in the following manner:

(a) Sometime in mid-1970, Leo Latham, branch manager of Martin in Wichita Falls, Texas, threatened Leon Flake, president of Flake, that if Flake did not stop soliciting Cascade's customers in Dallas, Texas, Martin would wage a price war in Wichita Falls in order to regain sales lost by Cascade to Flake;

(b) On May 22 or June 15, 1970, Dan Sportsman, general manager of Martin, threatened Leon Flake that Martin would put him out of business;

(c) Sometime in early 1971, William B. Troy decided that Martin should launch a sales campaign against Flake in Wichita Falls, Texas, where both Martin and Flake were doing business, in order to retaliate for those sales that Cascade had lost to Flake in Dallas, Texas; and

(d) Starting in April 1971, and continuing to date, Martin has conducted a retaliatory sales campaign against Flake both in Wichita Falls, Texas, and Lawton, Oklahoma, during which (1) salesmen of Martin have trailed Flake's delivery trucks in order to ascertain which customers they should solicit; (2) Martin has offered prices at and below the lowest prices it offered for services elsewhere in the State of Texas in order to win accounts from Flake; and (3) Martin has offered substantial amounts of free service in order to obtain business at Flake's expense.

13. The respondents have sought to coerce and induce Abilene Linen Supply Company ("Abilene") of Abilene, Texas, to refrain from soliciting customers of Martin in the following manner:

(a) In October 1969, after Abilene had obtained the Saga Food Service account which had previously been serviced by Martin, George Harrelson, a Martin branch manager in Abilene, Texas, told Don Wright, manager of Abilene, that he would "get even";

(b) Thereafter, Abilene lost business to Martin, in an amount in excess of the Saga Food Service account, through selective price cuts on the part of Martin; and

(c) On February 7, 1970, George Harrelson met with Don Wright and told him that if Abilene did not stop soliciting Martin's customers, he could expect more retaliation.

B. *Section V(B)*

14. Section V(B) of the Judgment provides that:

> Each corporate defendant is enjoined and restrained from, directly or indirectly:
>
> * * * *
>
> (B) Threatening to put any linen rental supplier out of business;

15. Petitioner charges that knowingly and willfully on May 22 or June 15, 1970, Dan Sportsman, general manager of Martin, made a telephone threat to Leon Flake, president of Flake, that Martin would put Flake out of business, in violation of Section V(B) of the Judgment.

C. *Section V(E)*

16. Section V(E) of the Judgment provides that:

> Each corporate defendant is enjoined and restrained from, directly or indirectly:
>
> * * *
>
> (E) Trailing or causing to be trailed the vehicle or vehicles, deliveryman or deliverymen of any other linen rental supplier;

17. Petitioner charges that knowingly and willfully on July 12, 1971, in Altus, Oklahoma, Gary Harris, a Martin salesman, was trailing a Flake truck in violation of Section V(E) of the Judgment.

D. *Section V(F)*

18. SectionV(F) of the Judgment provides that:

> Each corporate defendant is enjoined and restrained from, directly or indirectly:
>
> * * * *
>
> (F) Temporarily augmenting or adding to its personnel in any trading area outside of the course of a normal selling campaign for the purpose or with the effect of eliminating a competitor or competitors;

19. Petitioner charges that respondents have knowingly and willfully violated Section V(F) of the Judgment by temporarily adding the following Martin salesmen to the Wichita Falls, Texas, and Lawton, Oklahoma trading area during the following periods:

(a)	Gary Harris	April 3—July 23, 1971
(b)	Max Welch	May 8—July 2, 1971
(c)	Dave Isbel	July 5, 1971—to at least August 3, 1971
(d)	Mark Sutphen	July 12, 1971—to at least August 3, 1971
(e)	Bob Davis	March 20, 1971—to at least August 3, 1971

20. The above-named individuals carried out the retaliatory sales campaign against Flake which is alleged in Paragraph 12(d) hereof, and which was conducted outside of a normal Martin selling campaign for the purpose of eliminating Flake as a competitor in the linen rental supply business in the Dallas, Texas trading area.

E. *Section VI*

21. Section VI of the Judgment provides that:

> Each corporate defendant is enjoined and restrained from furnishing or offering or threatening to furnish linen supplies to a customer or potential customer on terms or conditions which involve below cost prices, lump sum cash payments to the customer, loans (other than bona fide loans by a defendant to its then existing customers), free service, gratuities or other similar inducements to obtain a contract or renewal of a contract for the furnishing of linen supplies, for the purpose or with the effect of eliminating a competitor or competitors.

22. Petitioner charges that respondents knowingly and wilifully carried out in part the retaliatory sales campaign described in Paragraph 12(d) hereof by using offers of free service and other similar inducements in

the Wichita Falls, Texas, and Lawton, Oklahoma trading area for the purpose of eliminating Flake as a competitor in the linen rental supply business in the Dallas, Texas trading area in violation of Section VI of the Judgment.

PRAYER

WHEREFORE, the petitioner moves this Court to issue an order directing each of the respondents to appear before this Court, at a time and place to be fixed in said order, to show cause why they should not be adjudged in criminal contempt of this Court and punished therefor.

/s/ Richard W. McLaren
RICHARD W. MCLAREN
Assistant Attorney General

/s/ Baddia J. Rashid
BADDIA J. RASHID

/s/ Robert B. Hummell
ROBERT B. HUMMEL

BERNARD M. HOLLANDER
Attorneys, Department of Justice
Washington, D.C. 20530

United States Attorney

/s/ L. Barry Costilo
L. BARRY COSTILO

/s/ Stephen F. Sonnett
STEPHEN F. SONNETT
Attorneys, Department of Justice
Washington, D.C. 20530

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO, TEXAS

Criminal No. SA 71 CR 419

Supplemental to Civil Action

Criminal Contempt Petition

Filed: May 3, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

MARTIN LINEN SUPPLY COMPANY, TEXAS SANITARY TOWEL SUPPLY CORP., AND WILLIAM B. TROY, RESPONDENTS

PETITION BY THE UNITED STATES FOR AN ORDER TO SHOW CAUSE WHY THE RESPONDENTS SHOULD NOT BE FOUND IN CRIMINAL CONTEMPT

The United States of America by its attorneys, acting under the direction of the Attorney General, presents this Petition for an order requiring the above-named respondents to show cause why they should not be found in criminal contempt of this Court. The petitioner represents to the Court as follows:

I

PRIOR JUDGMENT OF THIS COURT

1. On April 30, 1969, petitioner filed in this Court Civil Action No. SA 69-CA-114, brought under Section 4 of the Sherman Act (15 U.S.C. § 4), charging that since at least 1963 the respondents had been engaged in a combination and conspiracy to restrain, to monopolize and to attempt to monopolize the trade of furnishing linen supplies in the State of Texas, in violation of Sections 1 and 2 of the Sherman Act.

2. On June 2, 1969, upon consent of the parties, a Final Judgment ("Judgment") was entered in this Court in Civil Action No. SA 69-CA-114. A copy of this Judgment is annexed to this Petition and marked as Exhibit "A".

3. Section III of the Judgment provides:

> The provisions of this Final Judgment applicable to any defendant shall apply to each such defendant, to its successors and assigns, to each of their respective officers, directors, agents, servants and employees, and to all persons in active concert or participation with any such defendant who shall have received actual notice of this Final Judgment by personal service or otherwise.

4. Section X of the Judgment provides:

> Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or the carrying out of this Final Judgment, for the modification or termination of any of the provisions hereof for the purpose of enabling the plaintiff to apply to this Court for the enforcement of compliance herewith and for the punishment of violations hereof.

II

DESCRIPTION OF RESPONDENTS

5. Martin Linen Supply Company ("Martin"), is hereby made a respondent. Martin is a corporation organized and existing under the laws of the State of Texas with its principal office in San Antonio, Texas. Martin supplies linens in and around several large cities in the States of Texas and Oklahoma. Martin was a defendant in Civil Action No. SA 69-CA-114 and is a party to the Judgment in that action.

6. Texas Sanitary Towel Supply Corp. doing business as Cascade Linen Service ("Cascade"), is hereby made a respondent. Cascade is a corporation organized and existing under the laws of the State of New York with offices in Dallas, Texas. Cascade is a linen supplier doing business in the State of Texas and is affiliated through common ownership with the respondent Martin. Cascade was a defendant in Civil Action No. SA 69-CA-114 and is a party to the Judgment in that action.

7. William B. Troy, the controlling stockholder and president of both Martin and Cascade, is hereby made a respondent. Troy also actively participates in the ownership and control of many other linen supply companies doing business in various other areas of the United States. William B. Troy was a defendant in Civil Action No. SA 69-CA-114 and is a party to the Judgment in that action.

III

VIOLATIONS OF THE JUDGMENT CHARGED

8. Petitioner charges that the above-named respondents have knowingly and willfully disobeyed and violated, and are continuing to knowingly and willfully disobey and violate, orders and decrees of this Court as set forth in the Judgment and are in criminal contempt of the authority of this Court, as a result, among others, of the respondents' acts set forth below:

A. *Section IV(B)*

9. Section IV(B) of the Judgment provides that:

> Each defendant is enjoined and restrained from entering into, adhering to, enforcing or claiming any rights under any contract, agreement, understanding, plan or program with any person, not owned or controlled by such defendant, to directly or indirectly:
>
> * * * *
>
> (B) Divide, allocate or apportion markets, territories or customers for the furnishing of any linen supplies or otherwise restrict competition between or among linen rental suppliers;

10. Petitioner charges that respondent William B. Troy knowingly and willfully on or about May 25, 1970, entered into an understanding with Gene M. Gardner to allocate customers and restrict competition between City Linen Service and Cascade Linen Supply in violation of Section IV(B) of the Judgment.

B. *Section V(B)*

11. Section V(B) of the Judgment provides that:

> Each corporate defendant is enjoined and restrained from, directly or indirectly:
>
> • • • •
>
> (B) Threatening to put any linen rental supplier our of business;

12. Petitioner charges that knowingly and willfully on May 22 or June 15, 1970, in violation of Section V(B) of the Judgment, Dan Sportsman, general manager of Martin, made a telephone threat to Leon Flake, president of Flake Uniform & Linen Service, Inc. ("Flake"), that Martin would put Flake out of business.

C. *Section V(E)*

13. Section V(E) of the Judgment provides that:

> Each corporate defendant is enjoined and restrained from, directly or indirectly:
>
> • • • •
>
> (E) Trailing or causing to be trailed the vehicle or vehicles, deliveryman or deliverymen of any other linen rental supplier;

14. Petitioner charges that knowingly and willfully on July 12, 1971, in Altus, Oklahoma, Gary Harris, a Martin salesman, in the course of his employment, was trailing a Flake truck in violation of Section V(E) of the Judgment.

D. *Section V(F)*

15. Section V(F) of the Judgment provides that:

> Each corporate defendant is enjoined and restrained from, directly or indirectly:
>
> • • • •
>
> (F) Temporarily augmenting or adding to its personnel in any trading area outside of the course of a normal selling campaign for the purpose or with the effect of eliminating a competitor or competitors;

16. Petitioner charges that respondents have knowingly and willfully violated Section V(F) of the Judgment by temporarily adding the following Martin salesmen to the Wichita Falls, Texas, and Lawton, Oklahoma trading area during the following periods:

(a) Gary Harris	April 3—July 23, 1971
(b) Max Welch	May 8—July 2, 1971
(c) Dave Isbel	July 5, 1971—to at least August 3, 1971
(d) Mark Sutphen	July 12, 1971—to at least August 3, 1971
(e) Bob Davis	March 20, 1971—to at least August 3, 1971

17. The above-named individuals carried out a campaign against Flake which was conducted outside of a normal Martin selling campaign for the purpose of eliminating Flake as a competitor in the linen rental supply business in the Dallas, Texas trading area.

E. *Section VI*

18. Section VI of the Judgment provides that:

> Each corporate defendant is enjoined and restrained from furnishing or offering or threatening to furnish linen supplies to a customer or potential customer on terms or conditions which involve below cost prices, lump sum cash payments to the customer, loans (other than bona fide loans by a defendant to its then existing customers), free service, gratuities or other similar inducements to ob-

tain a contract or renewal of a contract for the furnishing of linen supplies, for the purpose or with the effect of eliminating a competitor or competitors.

19. Petitioner charges that respondents knowingly and willfully threatened to furnish and did furnish from March 20, 1971 to at least August 3, 1971, free service and other similar inducements in the Wichita Falls, Texas and Lawton, Oklahoma trading area for the purpose of eliminating Flake as a competitor in the linen rental supply business in the Dallas, Texas trading area in violation of Section VI of the Judgment.

PRAYER

WHEREFORE the petitioner moves this Court to issue an order directing each of the respondents to appear before this Court, at a time and place to be fixed in said order, to show cause why they should not be adjudged in criminal contempt of this Court and punished therefor.

/s/ Thomas E. Kauper
THOMAS E. KAUPER
Assistant Attorney General

/s/ Baddia J. Rashid
BADDIA J. RASHID

/s/ Bernard M. Hollander
BERNARD M. HOLLANDER
Attorneys, Department of Justice
Washington, D.C. 20530

United States Attorney

/s/ Stephen F. Sonnett
STEPHEN F. SONNETT

/s/ W. Clyde Robinson
W. CLYDE ROBINSON
Attorneys, Department of Justice
Washington, D.C. 20530

[78]

RELEVANT PORTIONS OF TRIAL TRANSCRIPT

February 21, 1975

(The jury began deliberating at 9:00 O'Clock A.M. and then at 12:25 the following occurred:)

THE COURT: Now gentlemen, I have a note from the jury, "We have reached a verdict on only one Defendant. We honestly believe we can never unanimously agree on a verdict on the remaining two defendants. Signed February 21, 1975, Max Wagonhorn, Foreman."

Well, of course I think the thing to do now is to have the jury come in and at least have the verdict form [79] presented to the Court. I just have to make a judgment at that time. It just depends to a large extent on what they have found as to what action I will take. And it may be that I will give them further instructions and cause them to deliberate further, or I may, if they are hopelessly deadlocked as they say they are, discharge them. I'll just have to see. All right, will you have the jury brought down.

THE MARSHALL: I will.

THE COURT: Let's bring the jury in. Now, in the event the jury is hopelessly deadlocked, you will want the jury Foreman released from the rule in the event we would want to know how they stand, is that right, gentlemen?

MR. BARRERA: Yes, Your Honor.

(The jury was brought into the room.)

THE COURT: Mr. Wagonhorn, I'm going to ask you to take the seat on the end there. The balance of the jury can move down so that you can be accommodated by having the end chair. All right, you may be seated. Mr. Wagonhorn, would you please rise, sir. Mr. Wagonhorn, are you the Foreman of this jury?

THE FOREMAN: Yes, sir.

THE COURT: I have a note here which I will [80] read. "We have reached a verdict on only one Defend-

ant. We earnestly believe we can never unanimously agree on the remaining two Defendants."

But now my question Mr. Wagonhorn as Foreman of the jury, are you able to report that you have reached a unanimous verdict as to one Defendant?

THE FOREMAN: Yes.

THE COURT: And you do feel like that you are hopelessly deadlocked as to the other two Defendants?

THE FOREMAN: Yes, I do.

THE COURT: I must interpret that as the gist and meaning of your memo to me. Is that right, sir?

THE FOREMAN: Yes, sir.

THE COURT: All right. Now, the lawyers are going to want to know how you stand. I'm going to ask you now to approach the bench and I'm going to ask the lawyers to come forward, please.

(At the bench.)

THE COURT: You feel like further deliberations would be absolutely futile and useless?

THE FOREMAN: Yes, sir.

THE COURT: Now then, with reference to the verdict as to the two Defendants, how do you stand as to those [81] two?

THE FOREMAN: Eleven to one.

THE COURT: Is it for acquittal or for conviction?

THE FOREMAN: For conviction.

THE COURT: For conviction. And that is as to the two Defendants?

THE FOREMAN: Yes.

THE COURT: And that is for guilty?

THE FOREMAN: Yes, sir.

THE COURT: One for acquittal; one is holding out for acquittal?

THE FOREMAN: One for acquittal, yes, sir.

THE COURT: All right. Okay, that's what we wanted to know. But your verdict is unanimous as to one Defendant?

THE FOREMAN: Right.

THE COURT: Would you now just take your seat and I'll ask you to give the verdict form to the Marshal.

THE FOREMAN: I didn't bring it.

THE COURT: Where is the verdict form?

THE FOREMAN: Back in the jury room.

THE COURT: We'll have to take Mr. Waggonhorn back to get the jury form. He didn't bring any of the papers with him and the jury form is still back there. Just [82] accompany Mr. Waggonhorn back to the jury room. Get the jury form and bring all of the Exhibits back.

THE FOREMAN: Yes, Your Honor.

(A short pause while the Foreman went up to get the papers.)

THE COURT: Mr. Waggonhorn, have you signed the verdict form and dated it?

THE FOREMAN: Yes.

THE COURT: And in those cases where you couldn't reach a verdict, those are left blank?

THE FOREMAN: We left them blank.

THE COURT: All right, very well. Now, if you will hand your verdict to the Bailiff, Mr. Muzquiz. All right. Now, hand it to Mrs. Marley.

All right Mr. Troy, would you go with your counsel to the lectern and hearken to the Jury verdict. You may read the jury verdict.

THE CLERK: With respect to the charge that the Defendant violated the consent decree, "We the jury find the Defendant Troy not guilty. Signed February 21, 1975."

THE COURT: All right, you are discharged. You are acquitted, Mr. Troy. You are found not guilty. We will receive your verdict, members of the jury as to the [83] Defendant Troy and I think it is a very fair and just verdict.

Now at this time, I'm going to excuse the jury and declare a mistrial as to the two remaining Defendants. And under the circumstances, I'm going to again of course remind you that your deliberations and thought processes, that is, what went on in the jury room is confidential. It is secret. And of course the purpose for that rule, Rule 20, in the Western District of Texas

is to some measure protect the confidences and privacy of the jurors.

All District Courts don't have that rule, but we have it here. So, you are not to discuss the case or your deliberations with anybody, with anyone, any lawyer, anyone connected with the parties or anyone else unless I free you to do that. That is, unseal your lips. I will read, as I'm required to do, Rule 20.

"Jurors are not to be interviewed. No attorney or any party to an action or other person shall himself or through any investigator or other person acting for him interview, examine or question any juror, relative, friend or associate thereof either during the pendency of the trial or with respect to the deliberations of the verdict of the jury in any action except on leave of Court granted upon good cause shown."

Now, you are excused from further service of this term of Court and I am very grateful to you. I look forward hopefully to have you in this Court again. God bless you [84] and you are excused. All right.

(The jury then left the courtroom and the following is had outside their hearing and presence:)

THE COURT: All right gentlemen, where do we go from here? What is the position of the Government?

MR. SONNETT: At this time, I really don't know, Your Honor.

THE COURT: I'll be frank with you, gentlemen. I almost instructed a verdict for all Defendants in this case. I almost granted a judgment for the Defendants. I think this is one of the weakest—I'm saying you did a very creditable job with what you had, Mr. Sonnett. I have seen some contempt cases, but this is without a doubt the weakest I've ever seen.

It appears to me that this was just nothing in the world but a fight between a bunch of cut-throat competitors in a very competitive business where one of them was fighting at a disadvantage with this consent decree. And the other people were taking advantage. That's the way this thing strikes me. And my present inclination, I'm not going to make that judgment today,

would be to enter a judgment of acquittal as to these other two Defendants if an appropriate motion was made for [85] judgment non absente veredicto. That's the way I feel about it at the present time. That's my inclination. I have heard all of the evidence in the case.

I talked to Judge Spears about this consent decree this morning. I have gone over these matters with him. He absolutely has no recollection of the consent decree, but he just enters them like I do if the parties want them. But he is of the opinion in view of what I've told him that he would entertain a motion based upon my relay to him of what has happened during this trial, he's receptive to a motion to set aside the consent decree or refer it to me for my decision.

My inclination would be that I would recommend that counsel for the Defendants in this case do that. I think the consent decree as entered and as the evidence shows in this type of business places the Defendants at a disadvantage against other competitors. And I think people like Flake and these other people are taking advantage of them.

If anybody should be under a consent decree, I would say in this particular case some of these witnesses in this case should certainly be. But it just so happens that Martin Linen was under this injunctive restraint, and it looks like to me that people have taken advantage of them according to the proof here. I certainly couldn't see under any circumstances where Mr. Troy has violated it.

MR. SONNETT: Your Honor, as Your Honor [86] recognizes, this is an industry which is very disruptive in their competitive practices. We do have a series of antitrust judgments in this industry, Your Honor. And—

THE COURT: Well, I believe from what I have heard here I would be inclined, if it was up to me to set this consent decree aside, to let you earn the right to put these parties under injunction because there gets to be a thin line between open competition where the public is going to get the best prices and where people are using a consent decree to hammer somebody over the head where they can't keep up. And that's what it

looks like here. These people are filing a consent decree against this one Defendant and the president individually, and they use that as the basis for enlarging and expanding and they've been just as guilty it seems to me of the very vices that you have charged the Defendants with in this case.

MR. SONNETT: Yes, Your Honor.

THE COURT: But they just happen not to be under the consent decree.

MR. SONNETT: The problem is, Your Honor, of course we have limited resources, and this is an industry, Your Honor, where we believe that these consent decrees are followed or at least they are a sign post to other competitors in the industry. And to withdraw a decree because it puts them at a disability would open up again—

THE COURT: How many consent decrees have [87] been entered against Martin to which it has consented in this country today?

MR. SONNETT: Martin itself?

THE COURT: Uh-huh.

MR. SONNETT: One.

THE COURT: Is this the only one?

MR. SONNETT: But National is under a consent decree, Consolidated—

THE COURT: I haven't tried National in this case. I did try Martin Linen.

MR. SONNETT: My only point was, Your Honor—

THE COURT: To try to establish criminal penalties for contempt beyond a reasonable doubt, it absolutely staggers my mental capabilities. I just don't see how in this particular instance that this proof would show criminal intent or contumacious acts under this consent decree.

Now, perhaps the consent decree is too broad. I have seen them where I thought they were too broad where I have changed them. And I think this one may be too broad in view of the type of industry we are concerned with here. Sometimes the Defendant enters into a consent decree and later rues the day that he did it and wishes that he had had an opportunity to retry that question again.

Once he is under it, then it is up to the Court [88] to let him out of it. And of course when he consents to it—and I don't like to enter consent decrees to be perfectly honest with you open handedly ad infinitim. I think that they've been under this restraint now since 1969. I think that's long enough for people to reform and to correct some of the vices with which they were charged originally. That's the present feeling of the Court. I wanted both sides to know how I felt about it. Anything further?

MR. SONNETT: No, Your Honor, not right now.

MR. BARRERA: On behalf of the Defendant and our witnesses, Your Honor, we want to express our appreciation for the Court's courtesy and concern. Thank you.

THE COURT: Well, don't thank me for doing my duty.

MR. BARRERA: I say for the Court's courtesy and concern.

THE COURT: All right. Okay. All right gentlemen, I'm open to any motions that either side would like to file. And I would also like to know where we stand on the civil contempt. I think that you have had your day in Court on the criminal contempt, and I'm inclined to believe that in cases involving white collar, alleged white collar crimes of this kind, contempt proceedings under consent decrees, there has got to be an end to it. I gave you every opportunity to convict these Defendants and you came very close on the corporate [89] Defendants, but you didn't come close on the individual.

I would be inclined to bring this thing to an end at this time and at least give Martin a fresh start if there's any way to do it. All right, we'll be in recess.

(End of proceedings.)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO, TEXAS

[Filed Feb. 27, 1975, Dan W. Benedict, Clerk.
By F. M., Deputy]

Criminal No. SA 71 CR 419

UNITED STATES OF AMERICA, PETITIONER

v.

MARTIN LINEN SUPPLY COMPANY, TEXAS SANITARY TOWEL SUPPLY CORP., AND WILLIAM B. TROY, RESPONDENTS

MOTION OF RESPONDENT MARTIN LINEN SUPPLY COMPANY FOR JUDGMENT OF ACQUITTAL

Now comes Respondent, MARTIN LINEN SUPPLY COMPANY ("Martin") and, pursuant to Rule 29(c), F.R.Cr.P., moves this Court for judgment of acquittal on the grounds that the evidence is insufficient to sustain a conviction of the offense charged. Respondent Martin urged such a motion both at the close of the Government's case and at the close of its case. The motion, in both instances, was denied and the case submitted to the jury. After due deliberation, the jury reported to the Court that it was hopelessly deadlocked and that it had reached a verdict with respect to William B. Troy. Mr. Troy was found "not guilty."

In support of its motion Martin reurges its previous motions for judgment of acquittal and presents the following points.

I.

The fact that the jury was deadlocked after lengthy deliberations is indicative that the evidence was inadequate to support a conclusion of guilt beyond a reasonable doubt.

II.

The Government charged that Respondent Troy did knowingly and willfully enter into an understanding with Gene M. Gardner to allocate customers and restrict competition between City Linen Service ("City") and Cascade Linen Service ("Cascade") in violation of Section IV(B) of the Consent Decree.

The Government has failed to allege and to discharge its heavy burden of proving, beyond a reasonable doubt, that Martin willfully and knowingly violated Section IV(B).

There is no credible evidence that shows that Troy entered into an understanding to allocate customers or restrict competition or that such was actually done. The jury so found when it returned a verdict of "not guilty" with respect to Troy.

Even if such understanding had been proven, there is no evidence that Troy was acting for Martin or in the course and scope of his employment by Martin. As a result, Troy's acts could not be imputed to Martin and thereby sustained a conviction for violation of the proscription.

III.

It is charged that Martin violated Section V(A)(1) of the Consent Decree by threatening, coercing, inducing, and attempting to induce Flake Uniform and Linen Supply ("Flake") and Abilene Linen Supply Company ("Abilene") to refrain from soliciting customers of Cascade and Martin by conducting retaliatory sales campaigns and threatening such campaigns. It is specifically alleged that threats were leveled and a sales campaign initiated against Flake for the purpose of coercing Flake to refrain from taking Cascade's customers in Dallas. It is further specifically alleged that George Harrelson, an employee of Martin, stated that he would "get even" with Abilene for business taken from Martin and that Abilene could expect more retaliation if Abilene continued to solicit Martin's customers. The use of selective price cuts on the part of Martin for the purpose of getting Abilene customers is also alleged as a violation of Section V(A)(1).

There is no evidence that the alleged facts, if done, were within the course and scope of the employment of the persons alleged to have committed the acts. All of the named employees were specifically directed by Martin not to violate the Consent Decree. There is no proof that Martin urged, approved, directed or condoned the alleged violations. Consequently, the acts, if done, were clearly outside the course and scope of employment and cannot serve as a basis for conviction of a violation of the Section.

There is no credible evidence that the alleged activities constituted threatening, coercing, inducing or attempting to induce Flake or Abilene from soliciting linen supply customers of Martin and Cascade. All the evidence shows is that the activities were directed at replacing volume lost as a result of competition, all of which did nothing more than create more competition, which must be the objective of the Consent Decree.

To "get even" or "retaliate" was clearly established to be absolutely normal and commonplace in the ebb and flow of competition. Furthermore, the Consent Decree does not, in any respect, prohibit getting even or retaliation. Such activities are associated with the totally permissible purpose of replacing volume or business lost as a result of competition, all of which does nothing more than further competition.

Even if all the activities were proven beyond a reasonable doubt and even if it were proven beyond a reasonable doubt that Martin knowingly and willfully directed, approved, condoned, or otherwise participated in such activities, it could not be convicted of a violation of Section V(A)(1) because its language is vague and ambiguous and, therefore, a conviction could not be sustained. Absolute proof of the ambiguity is found in the fact that this Court and the Fifth Circuit reached diametrically opposed conclusions as to the meaning of the section. If trained legal minds can reach such strikingly opposite conclusions, how can mere laymen be expected to know its true meaning. So long as the violative acts are not in bad faith, there is no contempt. The record is absolutely void of any evidence that bad faith, on the part of Martin, was present.

IV.

The Contempt Petition charges that Dan Sportsman, general manager of Martin, threatened to put Flake out of business. This allegation is made in connection with a recitation of Section V(B) of the Consent Decree which prohibits such threats.

There is no evidence that the alleged threat, if made, was within the course and scope of the employment of Sportsman. He was specifically directed by Martin not to violate the Consent Decree. There is no proof that Martin urged, approved, directed, or condoned the alleged threat. Consequently, the threat, if made, was clearly outside the course and scope of employment and cannot serve as a basis for conviction of a violation of the section.

The record is absolutely void of any credible evidence that Sportsman threatened to put Flake out of business. The burden to prove the charge beyond a reasonable doubt has not been discharged.

V.

It is charged that Gary Harris, a Martin salesman, acted in violation of Section V(E) of the Consent Decree by trailing a Flake truck, in the course of his employment.

It is not charged, and there is no proof that, even if the trailing occurred, Harris was acting within the course and scope of his employment. Harris was specifically directed by Martin not to violate the Consent Decree. There is no proof that Martin urged, approved, directed, or condoned the alleged trailing. Consequently, the trailing, if done, was clearly outside the course and scope of employment and cannot serve as a basis for conviction of a violation of the section.

There is absolutely no evidence of any type that a Flake truck was trailed by Gary Harris or anyone else.

VI.

The Contempt Petition charges that the Respondents violated Section V(F) of the Consent Decree by tem-

porarily augmenting or adding to its personnel in a trading area outside of a normal selling campaign for the purpose of eliminating Flake as a competitor in the Dallas trading area.

The Government had hopelessly failed to put forth any evidence that the salesmen who solicited business in the Lawton area were doing anything other than conducting a normal sales campaign for the purpose of increasing business. There was no showing of any purpose to eliminate Flake as a competitor in Dallas.

VII.

It is alleged that Respondents violated Section VI of the Consent Decree by threatening to furnish and furnishing free service and other similar inducements in the Wichita Falls trading area for the purpose of eliminating Flake as a competitor in Dallas.

The Government completely failed to prove, beyond a reasonable doubt, that free service and other similar inducements were threatened or given for the purpose of eliminating Flake as a competitor in Dallas. The evidence conclusively shows that threats to use or use of free service and similar inducement, if any there were, was for the sole purpose of getting new business to replace business lost to Flake in Dallas.

WHEREFORE, for all of the foregoing reasons, the Court is respectfully urged to enter judgment of acquittal with respect to the Respondent Martin.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing motion was served upon counsel for Petitioner by mailing a copy thereof to Stephen Sonnett, Esquire, Department of Justice, Antitrust Division, Washington, D.C. 20530, on the 27th day of February, 1975.

/s/ Roy R. Barrera
ROY R. BARRERA

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

[Filed Feb. 27, 1975, Dan W. Benedict, Clerk.
By F. M., Deputy]

Criminal No. SA 71 CR 419

UNITED STATES OF AMERICA, PETITIONER

v.

MARTIN LINEN SUPPLY COMPANY, TEXAS SANITARY TOWEL SUPPLY CORP., AND WILLIAM B. TROY, RESPONDENTS

MOTION OF RESPONDENT TEXAS SANITARY TOWEL SUPPLY CORP. FOR JUDGMENT OF ACQUITTAL

Now comes Respondent, TEXAS SANITARY TOWEL SUPPLY CORP. ("Cascade") and, pursuant to Rule 29(c), F.R.Cr.P., moves this Court for judgment of acquittal on the grounds that the evidence is insufficient to sustain a conviction of the offense charged. Respondent Cascade urged such a motion both at the close of the Government's case and at the close of its case. The motion, in both instances, was denied and the case submitted to the jury. After due deliberation, the jury reported to the Court that it was hopelessly deadlocked with respect to Cascade and Martin Linen Supply Company and that it had reached a verdict with respect to William B. Troy. Mr. Troy was found "not guilty".

In support of its motion Cascade reurges its previous motions for judgment of acquittal and presents the following points.

I.

The fact that the jury was deadlocked after lengthy deliberations is indicative that the evidence was inadequate to support a conclusion of guilt beyond a reasonable doubt.

II.

The Government charged that Respondent Troy did knowingly and willfully enter into an understanding with Gene M. Gardner to allocate customers and restrict competition between City Linen Service ("City") and Cascade in violation of Section IV(B) of the Consent Decree.

The Government has failed to allege and to discharge its heavy burden of proving, beyond a reasonable doubt, that Cascade willfully and knowingly violated Section IV(B).

There is no credible evidence that shows that Troy entered into an understanding to allocate customers or restrict competition or that such was actually done. The jury so found when it returned a verdict of "not guilty" with respect to Troy.

Even if such understanding had been proven, there is no evidence that Troy was acting for Cascade or in the course and scope of his employment by Martin. As a result, Troy's acts could not be imputed to Cascade and thereby sustained a conviction for violation of the proscription.

III.

It is charged that Cascade violated Section V(A)(1) of the Consent Decree by threatening, coercing, inducing, and attempting to induce Flake Uniform and Linen Supply ("Flake") and Abilene Linen Supply Company ("Abilene") to refrain from soliciting customers of Cascade and Martin by conducting retaliatory sales campaigns and threatening such campaigns. It is specifically alleged that threats were leveled and a sales campaign initiated against Flake for the purpose of coercing Flake to refrain from taking Cascade's customers in Dallas. It is further specifically alleged that George Harrelson, an employee of Martin Supply Company ("Martin"), stated that he would "get even" with Abilene for business taken from Martin and that Abilene could expect more retaliation if Abilene continued to

solicit Martin's customers. The use of selective price cuts on the part of Martin for the purpose of getting Abilene customers is also alleged as a violation of Section V(A)(1).

There is no evidence that the alleged facts, if done, were within the course and scope of the employment of the persons alleged to have committd the acts. All of the named employees were specifically directed by Martin not to violate the Consent Decree. There is no proof that Martin urged, approved, directed or condoned the alleged violations. Consequently, the acts, if done, were clearly outside the course and scope of employment and cannot serve as a basis for conviction of a violation of the Section.

In addition, there is no evidence that the acts, if done, were ordered, directed, or requested by or in any way connected to Cascade or even that Cascade knew of any such acts. As a result, the alleged acts cannot, under any theory, be imputed to Cascade and serve as a basis for conviction of violations of the section.

There is no credible evidence that the alleged activities constituted threatening, coercing, inducing or attempting to induce Flake or Abilene from soliciting linen supply customers of Martin and Cascade. All the evidence shows is that the activities complained of were directed at replacing volume lost as a result of competition, all of which did nothing more than create more competition, which must be the objective of the Consent Decree.

To "get even" or "retaliate" was clearly established to be absolutely normal and common place in the ebb and flow of competition.

Furthermore, the Consent Decree does not, in any respect, prohibit getting even or retaliation. Such activities are associated with the totally permissable purpose of replacing volume or business lost as a result of competition, all of which does nothing more than further competition.

Even if all the activities were proven beyond a reasonable doubt and even if it were proven beyond a reasonable doubt that Cascade knowingly and willfully directed,

approved, condoned, or otherwise participated in such activities, it could not be convicted of a violation of Section V(A)(1) because its language is vague and ambiguous and thus a conviction cannot be sustained. Absolute proof of the ambiguity is found in the fact that this Court and the Fifth Circuit reached diametrically opposed conclusions as to the meaning of the section. If trained legal minds can reach such strikingly opposite conclusions, how can mere laymen be expected to know its true meaning. So long as the violative acts are not in bad faith, there is no contempt. The record is absolutely void of any evidence that bad faith, on the part of Cascade was present.

VI.

The Contempt Petition charges that Dan Sportsman, general manager of Martin, threatened to put Flake out of business. This allegation is made in connection with a recitation of Section V(B) of the Consent Decree which prohibits such threats.

There is no evidence that the alleged threat, if made, was within the course and scope of the employment of Sportsman. He was specifically directed by Martin not to violate the Consent Decree. There is no proof that Martin urged, approved, directed, or condoned the alleged threat. Consequently, the threat, if made, was clearly outside the course and scope of employment and cannot serve as a basis for conviction of a violation of the section.

There is no allegation nor is there any proof of any type that Cascade knew of any such threat or that it ordered, directed or condoned, or was in any way connected with any such threat. Absent such proof, beyond a reasonable doubt, there can be no conviction for a knowing and willful violation of the Section by Cascade.

The record is absolutely void of any credible evidence that Sportsman threatened to put Flake out of business. The burden to prove the threat beyond a reasonable doubt has not been discharged.

V.

It is charged that Gary Harris, a Martin salesman, acted in violation of Section V(E) of the Consent Decree by trailing a Flake truck, in the course of his employment. It is not charged, and there is no proof that, even if the trailing occurred, Harris was acting within the course and scope of his employment. Harris was specifically directed by Martin not to violate the Consent Decree. There is no proof that Martin urged, approved, directed, or condoned the alleged trailing. Consequently, the trailing, if done, was clearly outside the course and scope of employment and cannot serve as a basis for conviction of a violation of the section. Further, there is no evidence that Cascade requested, directed, knew of, condoned, or was, in any way, connected to the alleged incident, even if it did occur.

There is no evidence of any type that a Flake truck was trailed by Gary Harris or anyone else.

VI.

The Contempt Petition charges that the Respondents violated Section V(F) of the Consent Decree by temporarily augmenting or adding to its personnel in a trading area outside of a normal selling campaign for the purpose of eliminating Flake as a competitor in the Dallas trading area.

The Government has hopelessly failed to put forth any evidence that the salesmen who solicited business in the Lawton area were doing anything other than conducting a normal sales campaign for the purpose of increasing business. There was no showing of any purpose to eliminate Flake as a competitor in Dallas.

Even if the sales effort was abnormal and for the purpose of eliminating Flake as a competitor in Dallas, there is no proof that Cascade knew of the abnormality and purpose or that it ordered, directed or condoned it. Absent such proof, beyond a reasonable doubt, there can be no conviction of Cascade for knowingly and willfully violating Section V(F) of the Consent Decree.

VII.

It is alleged that Respondents violated Section VI of the Consent Decree by threatening to furnish and furnishing free service and other similar inducements in the Wichita Falls trading area for the purpose of eliminating Flake as a competitor in Dallas.

The Government completely failed to prove, beyond a reasonable doubt, that free service and other similar inducements were threatened or given for the purpose of eliminating Flake as a competitor in Dallas. The evidence conclusively shows that any threats to use or use of free service and similar inducements, if any there were, was for the sole purpose of getting new business to replace business lost to Flake in Dallas.

Even if such threats and use were proven, Cascade could not be convicted of a violation of the section because the Government failed to discharge its heavy burden of proving that Cascade had any knowledge thereof or that it ordered, directed or condoned or was connected with any such threats or use, and thereby knowingly and willfully violated the Consent Decree.

Wherefore, for all the foregoing reasons, the Court is respectfully urged to enter judgment of acquittal with respect to the Respondent Cascade.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing Motion was served upon counsel for Petitioner by mailing a copy thereof to Stephen Sonnett, Esquire, Department of Justice, Antitrust Division, Washington, D.C. 20530, on the 27th day of February, 1975.

/s/ Roy R. Barrera

SUPREME COURT OF THE UNITED STATES

No. 76-120

UNITED STATES, PETITIONER

v.

MARTIN LINEN SUPPLY COMPANY, ET AL.

ORDER ALLOWING CERTIORARI. Filed November 1, 1976

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 225109 28

Supreme Court, U. S.
FILED
AUG 23 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-120

UNITED STATES OF AMERICA,
Petitioner,
v.
MARTIN LINEN SUPPLY COMPANY and
TEXAS SANITARY TOWEL SUPPLY CORPORATION,
Respondents.

BRIEF OF RESPONDENTS REQUESTING DENIAL OF THE PETITION FOR WRIT OF CERTIORARI

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August 23, 1976

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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IN THE

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OCTOBER TERM, 1976

No. 76-120

UNITED STATES OF AMERICA,
Petitioner,

v.

MARTIN LINEN SUPPLY COMPANY and
TEXAS SANITARY TOWEL SUPPLY CORPORATION,
Respondents.

BRIEF OF RESPONDENTS REQUESTING DENIAL OF THE PETITION FOR WRIT OF CERTIORARI

Respondents request that this Court deny the United States' Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

I. JURISDICTION

Petitioner has not demonstrated a conflict of decisions among different Courts of Appeals or an important unanswered question of federal law as required by Rule 19, 1(b), Supreme Court Rule, Part V, "Jurisdiction on Writ of Certiorari".

II. QUESTION PRESENTED

The Question Presented, as stated in the Petition, misstates the question actually presented since it omits the fact that the Motions were filed and the Judgments of Acquittal were entered pursuant to Rule 29(c), Federal Rules of Criminal Procedure. The Question Presented, properly stated, is:

> "Does the Double Jeopardy Clause preclude an appeal of an acquittal entered after a mistrial pursuant to Rule 29(c), Federal Rules of Criminal Procedure?"

III. STATEMENT OF THE CASE

Petitioner's Statement set forth on pages 3 through 7 of the Petition is essentially correct. Respondents would expand that statement, however, to point out that, while Respondents called only one witness, Petitioner's own witnesses testified in Respondents' favor. Before making the statements quoted by Petitioner (Petitioner's Brief for Certiorari at p. 5), the Trial Court stated:

> "I'll be frank with you, gentlemen. I almost instructed a verdict for all Defendants in this case. I almost granted a judgment for an instructed verdict. . . . I have seen some contempt cases, but this is without a doubt the weakest I have ever seen." (J.A. 673a)

Petitioner continues to ignore the fact that Respondents' Motions for Acquittal were timely made pursuant to Rule 29(c), Federal Rules of Criminal Procedure. The Trial Court reviewed the evidence and entered the Judgments of Acquittal pursuant to Rule 29(c).

IV. REASONS FOR DENIAL

This Court should deny certiorari because (1) the Double Jeopardy Clause forbids a review of the Trial Court's Judgments of Acquittal and (2) there are no conflicting applicable decisions from either this Court or another Circuit Court of Appeals.

A. Double Jeopardy Bars Appeal

Government's Petition seeks to erode the Double Jeopardy Clause and to destroy the significance of the specific provisions of Rule 29(c).

The Double Jeopardy Clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb. . . ." This Court has stated that "[t]he protection is not . . . against the peril of second punishment, but against being again tried for the same offense". *Kepner* v. *United States,* 195 U.S. 100, 130 (1904); *Ball* v. *United States,* 163 U.S. 662 (1896). Having initially failed here, the Government now seeks to try Respondents again for the same offense.

Jeopardy attached as to Respondents when the jury was empanelled and sworn. *Downum* v. *United States,* 372 U.S. 734 (1963). The Trial Court heard all of the Government's evidence, and, after the jury had become hung and was discharged, it entered Judgments of

Acquittal pursuant to Rule 29(c). The Government correctly contends that, if the Trial Court had *not* entered Judgments of Acquittal, a second trial would be permissible. It ignores, however, the very essence of this case—the Trial Court *did* enter Judgments of Acquittal based on the evidence of the trial. A new trial's availability after a mistrial is immaterial. The issue here is the appealability of Judgments of Acquittal entered pursuant to Rule 29(c).

The Government relates, at length, the fact that the Double Jeopardy Clause allows review in two distinct cases—(1) a pre-trial dismissal and (2) a dismissal setting aside a jury verdict of guilty. (Petitioner's Brief for Certiorari at pp. 7-11; Petitioner's Brief for Certiorari in *United States* v. *Sanford* at pp. 10-13). Again, the Government ignores the essence of this case. The instant Judgments of Acquittal were not pre-trial dismissals, and there is no jury verdict of guilty.

This Court established the appealability of a pre-trial dismissal in *Serfass* v. *United States,* 420 U.S. 377 (1975). Chief Justice Burger, writing for the Court, observed that pre-trial dismissals are a review of an indictment's sufficiency in legal terms and *are not* based on evidence adduced at trial. In addition, jeopardy had not attached at the pre-trial stage. Without having been placed in jeopardy, a defendant could not claim the protection of the Double Jeopardy Clause. In this case, Respondents were in jeopardy the moment the jury was sworn, and the Trial Court's action *was* based on evidence adduced at trial.

United States v. *Wilson,* 420 U.S. 332 (1975), established the appealability of a dismissal after a jury

verdict of guilty. The *Wilson* rationale was that a reversal of the *Wilson* dismissal would reinstate the guilty verdict without a second trial. Therefore, Wilson would not "again be tried for the same offense". If Respondents' Judgments of Acquittal were reversed, a second trial would be mandatory. Respondents would be twice put in jeopardy for the same offense. Neither the *Serfass* nor the *Wilson* holding is applicable to the instant case.

Despite the Government's efforts to ignore the attachment of jeopardy and the Trial Court's review of the evidence, the instant case involves Judgments of Acquittal based on factual determinations. Rule 29 gives the Trial Court power to grant Motions for Acquittal after either side has closed, while the jury deliberates or after the jury has returned with either a guilty verdict, or without having returned a verdict. This Court has established that a Trial Court's Judgment of Acquittal pursuant to Rule 29 is final unless there is a jury verdict of guilty. *Fong Foo* v. *United States,* 369 U.S. 141 (1962). In *Fong,* the Trial Court directed a verdict of acquittal during the presentation of the evidence. This Court held that " . . . the verdict of acquittal was final, and could not be reviewed . . . without putting (the petitioners) twice in jeopardy, and thereby violating the Constitution". 369 U.S. at 143.

In *United States* v. *Jenkins,* 420 U.S. 358 (1975), this Court denied the appealability of an acquittal entered by a Trial Court after a bench trial. Writing for the Court, Mr. Justice Rehnquist stressed:

> "In those cases, where the defendants had not been adjudged guilty, the Government's appeal

> was not permitted since further proceedings, usually in the form of a full retrial, would have followed."

420 U.S. at 369.

The Trial Court could have entered Judgments of Acquittal at the close of the Government's evidence, while the jury deliberated, or, as it did, after the jury was unable to reach a verdict. Judgments of Acquittal at each of these moments would have the same effect under Rule 29. The Fifth Circuit agreed when it observed:

> "The Government argues that its right to insist on a jury trial would be abridged if this Court views the proceedings below as if they were the result of a bench trial. This assertion ignores, however, the fact that whether the trial is to a jury or to the court, if the evidence is deemed insufficient to support a verdict or finding of guilty the court must grant a directed verdict of acquittal." (Petitioner's Brief for Certiorari at p. 5a)

Since the instant Judgments of Acquittal were based on an evaluation of the evidence presented at trial and a reversal would compel a second trial, the Double Jeopardy Clause bars an appeal of the Trial Court's Judgments of Acquittal.

B. Agreement Among Circuits

The Government contends that the Fifth Circuit's well-reasoned decision in the instant case conflicts with the Ninth Circuit's holding in *United States* v. *Sanford,* No. 73-3016 (9th Cir., filed May 27, 1976), *petition for cert. filed*, No. 75-1867, June, 1976, and the Sixth Circuit's holding in *United States* v. *Wilson,* 534 F.2d 76 (6th Cir. 1976). The Ninth Circuit in *Sanford,* on

weaker facts, held that the Government's appeal was barred by the Double Jeopardy Clause. Since the Fifth Circuit reached the same decision, the two decisions are *not* in conflict.

The Government has attempted in its Petition in *Sanford* and in the instant Petition to merge the two cases. The two cases are not the same. The *Sanford* decision does not involve Rule 29(c). In *Sanford,* the Ninth Circuit extended the Fifth Circuit's holding in the instant case to bar the review of all post-trial Judgments of Acquittal unless there is a jury verdict of guilty.

United States v. *Wilson, supra,* does not conflict with the Fifth Circuit's decision in this case. In *Wilson*, there was no Judgment of Acquittal. *Wilson,* then is simply a determination of whether the Double Jeopardy Clause bars a new trial after a mistrial. As heretofore discussed, that question is immaterial to the instant Judgments of Acquittal.

The Sixth Circuit recently agreed with the Fifth Circuit's *Martin Linen* holding. *United States* v. *Robbins*, 510 F.2d 301 (6th Cir. 1975), *cert. denied,* 96 S.Ct. 772 (1976). In *Robbins*, the Trial Court granted the Defendant's Motion for Judgment of Acquittal after the Government rested. The Sixth Circuit held that double jeopardy barred a review of the Trial Court's decision.

V. CONCLUSION

The instant case involves *post-trial* judgments under Rule 29(c) and a reversal of those judgments would require a *second* trial. This Court has established that the Double Jeopardy Clause bars a review of such a

judgment. In addition, there is no conflict to be resolved by this Court. Therefore, this Court should deny the Government's Petition for Writ of Certiorari.

Respectfully submitted,

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August 23, 1976

VI. CERTIFICATE OF SERVICE

I certify that I served this Brief of Respondents Requesting Denial of the Petition for Writ of Certiorari on:

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by depositing three copies addressed to each of them, respectively, in the United States Post Office, San Antonio, Texas, on August 23, 1976, first class postage prepaid, at such addresses.

J. Burleson Smith

Supreme Court, U. S.
FILED
SEP 22 1976
MICHAEL RODAK, JR., CLERK

No. 76-120

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

MARTIN LINEN SUPPLY COMPANY AND
TEXAS SANITARY TOWEL SUPPLY CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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1. Respondents contend that the district court's decision to grant their motions for judgments of acquittal is not subject to appellate review because Fed. R. Crim. P. 29(c) authorizes a district judge to grant such a motion after a mistrial has been declared. That argument was not relied upon by the court of appeals and has nothing to recommend it. A rule authorizing a court to act upon a particular motion at a particular time does not determine the reviewability of a decision granting or denying the motion. Appealability is governed by another provision of law, 18 U.S.C. 3731, which authorizes the government to appeal from any order terminating a criminal case in the defendant's favor which may be reviewed without violating the Double Jeopardy Clause.

The decision below does not rely upon any inability to review judgments entered on the authority of Rule 29(c).[1] The court of appeals interpreted *United States* v. *Jenkins*, 420 U.S. 358, to mean that a post-trial[2] judgment in the defendant's favor can never be reviewed if a reversal will result in further trial proceedings, whether or not those further proceedings would themselves be barred by the Double Jeopardy Clause. That holding raises fundamental and important questions with respect to the scope of the government's right to appeal.

2. Respondents rely (Br. in Opp. 5, 7) upon *Fong Foo* v. *United States*, 369 U.S. 141, and *United States* v. *Robbins*, 510 F. 2d 301 (C.A. 6), certiorari denied, 423 U.S. 1048, for the proposition that the Double Jeopardy Clause precludes any review of a "judgment of acquittal."

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[1]Rule 29(c) authorizes a district court to grant a motion for judgment of acquittal after a jury has returned a verdict of guilty, as well as after a mistrial has been declared. The Court of Appeals for the Fifth Circuit has reversed at least two such judgments entered pursuant to Rule 29(c). *United States* v. *Burnette*, 524 F. 2d 29, certiorari denied, April 19, 1976 (No. 75-6102); *United States* v. *Cravero*, 530 F. 2d 666. In both cases the court of appeals held that the district judge erred in concluding that the evidence was not sufficient to support a verdict of guilty. If respondents' view were correct, *Burnette* and *Cravero* could not stand, because the judgments of acquittal had been entered on the authority of Rule 29(c). The court of appeals did not overrule *Burnette* or *Cravero*; it therefore could not have adopted respondents' theory that Rule 29(c) limits the right to appeal created by Section 3731.

[2]In the court of appeals' view some post-trial motions take place so long after trial that they are "really" pre-trial motions. See Pet. App. 8a-9a. Rule 29(c) has significance, in the court of appeals' view, only insofar as it divides the two classes of motions. Because the court of appeals believes that this division has double jeopardy significance, it expressed the opinion that an appeal should have been allowed in *United States* v. *Sanford*, petition for a writ of certiorari pending, No. 75-1867.

This Court has rejected, however, the argument that the words "judgment of acquittal" should have such talismanic significance, and the court of appeals accorded them none.[3] Both *Fong Foo* and *Robbins* dealt with orders entered in mid-trial terminating the prosecution. Although we believe that *Robbins* was wrongly decided, and that *Fong Foo* should no longer be followed to the extent that it appeared to make reviewability turn upon the language employed by the trial judge, it should be apparent that neither case supports the decision below, which did not involve a mid-trial termination and in which the mistrial provides independent justification for the holding of a second trial.

For these reasons, in addition to those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1976.

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[3]Pet. App. 2a n. 3. See, *e.g.*, *Serfass* v. *United States*, 420 U.S. 377, 390-393.

DOJ-1976-09

Supreme Court, U. S.
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DEC 23 1976
MICHAEL RODAK, JR., CLERK

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–9a) is reported at 534 F. 2d 585. A prior opinion of the court of appeals (Pet. App. 11a–28a) is reported at 485 F. 2d 1142. A prior opinion of the district court (Pet. App. 29a–39a) is not officially reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 10a) was entered on June 21, 1976. On July 15, 1976, Mr. Justice Powell extended the time within which to file a petition for a writ of certiorari to August 20,

1976. The petition was filed on July 27, 1976, and was granted on November 1, 1976. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Double Jeopardy Clause precludes an appeal by the United States from an order, otherwise appealable under 18 U.S.C. 3731, terminating a prosecution in favor of the defendant, where the order was entered in response to a motion filed several days after a mistrial had been declared due to inability of the jury to reach a verdict.

CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *.

2. The Criminal Appeals Act, 18 U.S.C. 3731, provides in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

3. Federal Rule of Criminal Procedure 29(c) provides:

> If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made

> or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

STATEMENT

On December 9, 1971, the United States filed civil and criminal contempt petitions in the Western District of Texas (A. 4–20). The petitions alleged that respondents, two commonly owned linen supply companies, and their president, William B. Troy, violated a consent decree entered in 1969 as the final judgment in an antitrust suit. See Pet. App. 44a–52a.

The district court dismissed the petitions to the extent they alleged violations of Section V(A)(1) of the consent decree.[1] Section V(A)(1) prohibits respondents from "directly or indirectly: (A) Threatening, coercing, inducing or attempting to induce: (1) Any linen rental supplier to refrain, while in business, from furnishing linen supplies to any customer" (Pet. App. 46a–47a). The contempt petitions alleged that respondents threatened their competitors with economic reprisals in violation of this prohibi-

[1] The district court's opinion (Pet. App. 29a–39a) was entered as an order "construing" the consent decree. The court of appeals held that this was a part of the contempt proceedings (Pet. App. 13a, 17a).

tion. The district court concluded, however, that Section V(A)(1) does not prohibit respondents from threatening competitors with economic reprisals, or offering to competitors economic inducements, in order to induce the competitors to quit soliciting linen supply business from respondents' existing customers (Pet. App. 34a–39a). The district court held that the consent decree should not be construed to prohibit the conduct in which respondents allegedly engaged because (*id.* at 38a) "[i]f [respondents] were to be hampered by the restrictions [the United States] seeks to impose * * * they would soon be marked for extinction by predatory competitors * * *."

The United States appealed, and the court of appeals reversed. It wrote that the activities alleged in the petition are violations of the decree "if their announced purpose is to cause [respondents'] competitors to refrain from competing * * *. * * * [T]he use of threats directed at competitors to restrain competition, or to obtain reciprocal noncompetitive agreements, as the Government alleges, goes to the heart of the antitrust problem" (Pet. App. 27a). The court remanded for a trial to determine whether the allegations are true. This Court denied certiorari. 415 U.S. 915.

The prosecution then filed a supplemental criminal contempt petition (A. 21–26).[2] After the prosecution

[2] The first criminal contempt petition had been dismissed in part by the district judge; the United States had dismissed the remainder of the petition without prejudice pending appellate resolution of the district court's decision. The supplemental petition reinstated all the charges.

declined to consent to a bench trial, the district court severed the criminal and civil proceedings. The criminal trial commenced on February 18, 1975.[3]

At the trial, several witnesses described a series of threats of economic retaliation by executives of respondent Martin Linen, directed at various competitors. The witnesses also testified that two executives of respondent Martin Linen threatened Flake Uniform Linen Service with retaliation if it persisted in soliciting customers of respondent Texas Sanitary. The government also presented testimony and documents demonstrating that respondent Martin Linen conducted a retaliatory sales campaign against Flake Uniform. Respondents did not offer any evidence to contradict the government's proof concerning threats.

The jury retired to deliberate on the morning of February 20, 1975. It continued deliberating on the morning of February 21, and court was reconvened shortly after noon on that date, when the jury sent a note to the judge. The jury reported that it had reached a verdict on one defendant but could not reach a verdict with respect to the other defendants (A. 27). Counsel consented to an inquiry about the numerical division of the jury concerning the other defendants (A. 27). The jury was brought into the courtroom, and the district court asked the foreman whether the jury was "hopelessly deadlocked" concerning the two other defendants; the foreman replied that it was (A. 28). He also replied affirmatively to the question whether "further deliberations would

[3] The civil contempt proceedings have not yet been tried.

be absolutely futile and useless" (A. 28). The foreman reported that the jury stood eleven to one for conviction of the two defendants with respect to which it had been unable to reach a verdict (A. 28).

The district court then accepted the verdict of not guilty with respect to Mr. Troy (A. 29), after which the court *sua sponte* declared a mistrial with respect to respondents and excused the jurors (A. 29). Counsel for respondents did not object to the declaration of the mistrial.

After the jurors had departed, the district judge advised counsel that he would be inclined "to enter a judgment of acquittal as to [respondents] if an appropriate motion was made" (A. 31). He remarked that he "almost instructed a verdict for all Defendants in this case" (A. 30) because the case seemed weak to him.

The judge elaborated by explaining (A. 30) that it appeared to him "that this was just nothing in the world but a fight between a bunch of cut-throat competitors in a very competitive business where one of them was fighting at a disadvantage with this consent decree. And the other people were taking advantage. That's the way this thing strikes me." The judge expressed dissatisfaction with the consent decree, stating that in his view it put respondents at a disadvantage as compared to their competitors, who were not under such a decree (A. 31–32). In the opinion of the judge, it was unfair to hold respondents liable for doing things their competitors were not forbidden to do. He went on (A. 32–33): "Sometimes

the Defendant enters into a consent decree and later rues the day that he did it and wishes that he had an opportunity to retry that question again. Once he is under it, then it is up to the Court to let him out of it."

On February 27, 1975, six days after the mistrial declaration, respondents accepted the court's invitation and filed motions for acquittal (A. 34–46). These motions set out the following grounds in support of the request for judgments of acquittal: (1) the fact that the jury was unable to reach a verdict demonstrates that the evidence was insufficient; (2) the acquittal of Mr. Troy shows that the evidence was insufficient; (3) the evidence did not establish that the threats by employees of respondents were made within the scope of their employment, or that the threats amounted to coercion; (4) respondents' conduct was justified because to "'get even' or 'retaliate' was clearly established to be absolutely normal and commonplace in the ebb and flow of competition" (A. 36); and (5) the language of the consent decree was too vague to support a charge of criminal contempt. Respondent Texas Sanitary also argued that the acts of employees of respondent Martin Linen could not be attributed to it.

On April 24, 1975, more than two months after the mistrial had been declared, the district court entered judgments of acquittal. Although the judge did not make findings of fact or conclusions of law, the judgments recited that "the Court finds that the grounds set forth in [the motions for acquittal] are good and

valid and that the Government has failed to prove the material allegations beyond a reasonable doubt; that further this defendant should be found 'not guilty'" (Pet. App. 41a, 43a).

The United States appealed pursuant to the Criminal Appeals Act, 18 U.S.C. 3731. The court of appeals concluded that the Double Jeopardy Clause bars the government's appeal. The court observed that the proceedings in the district court ended in an "acquittal" entered under Fed. R. Crim. P. 29(c) (Pet. App. 4a–5a). It quoted *United States* v. *Jenkins*, 420 U.S. 358, 370, as establishing a "general rule" (Pet. App. 7a) that "it is enough for purposes of the Double Jeopardy Clause, and therefore for the determination of appealability under 18 U.S.C. § 3731, that further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand." Because a reversal of the district court's "acquittal" would enable the government to try respondents a second time, the court concluded that the "general rule" announced in *Jenkins* "leads inescapably to the conclusion that no appeal lies from the directed verdict ordered by the court below" (Pet. App. 7a–8a).[4]

The government had relied in the court of appeals upon *United States* v. *Sanford*, 421 U.S. 996. The Ninth Circuit in *Sanford* had dismissed a government appeal from a post-mistrial order dismissing an

[4] The court of appeals did not discuss or distinguish its apparently contrary decision in *United States* v. *Moon*, 491 F.2d 1047 (C.A. 5).

indictment. This Court remanded the case for reconsideration in light of *Serfass* v. *United States*, 420 U.S. 377, an action which the Fifth Circuit took to mean that the appeal should be permitted in that case (Pet. App. 8a–9a).[5] The court distinguished *Sanford*, however, observing that the district court in *Sanford* had dismissed the indictment long after the time for filing a post-trial motion under Fed. R. Crim. P. 29(c) had elapsed. In the court's view, this made the order in *Sanford* an appealable "pretrial dismissal" (Pet. App. 9a), whereas the order in the instant case was nonappealable because it was an "acquittal" entered pursuant to a motion made within seven days after the mistrial.

SUMMARY OF ARGUMENT

This case is controlled by *United States* v. *Sanford*, No. 75–1867, decided October 12, 1976. In *Sanford*, as here, a trial ended in a mistrial because the jury was unable to agree upon a verdict. Four months later the district court in *Sanford* dismissed the indictment, concluding on the basis of the evidence at trial that the defendants were not guilty of any crime. This Court held that the United States could appeal that order, because a second trial would not violate the Double Jeopardy Clause.

Sanford, taken together with *United States* v. *Wilson*, 420 U.S. 332; *United States* v. *Jenkins*, 420 U.S. 358; and *Serfass* v. *United States*, 420 U.S. 377,

[5] The court of appeals evidently was unaware that almost a month before the date of its decision the appeal in *Sanford* had been dismissed a second time. See *United States* v. *Sanford*, 536 F. 2d 871 (C.A. 9), reversed, No. 75–1867, decided October 12, 1976.

indicates that the critical question in determining whether the government may appeal an order terminating a prosecution in favor of the accused is whether the proceedings on remand, were the prosecution to prevail on appeal, would violate the Double Jeopardy Clause. Further proceedings in the instant case would not violate that Clause, because it was the inability of the jury to agree upon a verdict that gave rise to the necessity for holding a second trial. The Court's analysis in *Sanford* (slip op. 3) is fully applicable here: "The dismissal in this case, like that in *Serfass,* was prior to a trial that the Government had a right to prosecute and that the defendant was required to defend. Since in such cases a trial following the Government's successful appeal of a dismissal is not barred by double jeopardy, an appeal from the dismissal is authorized by 18 U.S.C. § 3731."

There may be reasons why a second trial should not be held in this case, but the Double Jeopardy Clause is not among them. If the district court is right that respondents should prevail in this case because of insufficiency of the evidence, imprecision of the consent decree, or any other reason, respondents are entitled to an affirmance on the merits that would erect a complete shield against reprosecution. But if the district court is wrong, the declaration of a mistrial removes any bar to a second trial.

The court of appeals thought that this case could be distinguished from *Sanford* because here the motion to terminate the prosecution was filed six days after the mistrial was declared, which was within the seven-

day period fixed by Fed. R. Crim. P. 29(c). There is no reason, however, why the propriety of a second trial should turn upon the length of time between the declaration of a mistrial and the filing of a post-mistrial motion. Once the mistrial had been declared, the court was entitled to try respondents a second time; all of the factors that affect the propriety of holding a second trial were fixed at the moment the jury was dismissed. If, at that moment, the district court could have set the case for a second trial without violating the Double Jeopardy Clause, then the United States should be entitled to engage in such appellate proceedings as may be necessary to bring about that second trial.

Respondents have no constitutionally protected interest in preserving the finality of the disposition in their favor. There was here no *verdict* of acquittal. Indeed, there is no verdict at all, the finder of fact—the jury—having divided eleven to one for conviction. The trial judge has no authority to resolve factual disputes in a jury trial, and so no factual determinations would be subject to reexamination at a second trial. As *Wilson, Jenkins,* and *Serfass* make plain, the fact that the case may have terminated in the district court with a judgment on the merits in the defendant's favor does not preclude an appeal by the government to correct errors of law, unless there has been a verdict of acquittal by the finder of fact. There was no such verdict here, and the Double Jeopardy Clause therefore does not bar a second trial of respondents.

ARGUMENT

THE GOVERNMENT MAY APPEAL ANY ORDER, ENTERED AFTER A MISTRIAL HAS BEEN DECLARED, THAT TERMINATES A PROSECUTION IN FAVOR OF A DEFENDANT

A. A VERDICT OF ACQUITTAL BY THE JURY IS THE ONLY ABSOLUTE BAR TO A SECOND TRIAL FOR THE SAME OFFENSE

The court of appeals dismissed the government's appeal in this case because it thought that there is a "general rule" (Pet. App. 7a) that the government may not appeal if success on appeal would lead to further proceedings in the district court concerning the general issue of guilt or innocence. There is, however, no such "general rule." On the contrary, a rule that a second trial invariably violates the Double Jeopardy Clause "would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. * * * [T]he purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts the power to put the defendant to trial again." *Wade* v. *Hunter,* 336 U.S. 684, 688–689.

This Court has emphasized that a defendant in a criminal trial has important interests in avoiding multiple trials for the same offense. See *Green* v. *United States,* 355 U.S. 184, 187–188. Because of these interests, repetitious trials are to be avoided where possible, and the Double Jeopardy Clause often interposes a bar against multiple trials even where there

is no threat of multiple punishment.[6] See, *e.g., Breed* v. *Jones,* 421 U.S. 519. But multiple trials are not always prohibited. Indeed, multiple trials are an essential and accepted element of our system of justice.

A new trial may be held if the first trial is terminated before verdict because of manifest necessity. The most common of these situations occurs when a mistrial is declared because the jury is unable to agree unanimously. *United States* v. *Perez,* 9 Wheat. 579.[7] A new trial may be held if the accused surrenders his

[6] We do not believe, however, that these considerations pertain to corporations, such as respondents. Corporations cannot be exposed to embarrassment or humiliation. They cannot be imprisoned. The Double Jeopardy Clause, which mentions only "jeopardy of life or limb," is most concerned with exposure to punishments of a sort corporations cannot suffer. A criminal prosecution against a corporation exposes it to nothing that a civil suit does not. We therefore submit that the usual principles of *res judicata* afford to corporations sufficient protection against repetitious litigation. See Note, *Double Jeopardy and Corporations: "Lurking in the Record" and "Ripe for Decision,"* 28 Stan. L. Rev. 805 (1976). This Court has held that other provisions of the Fifth Amendment, such as the Self-Incrimination Clause, do not apply to corporations. See *Bellis* v. *United States,* 417 U.S. 85; *Wilson* v. *United States,* 221 U.S. 361. We know of no reason why the Double Jeopardy Clause should apply to corporations when the Self-Incrimination Clause does not. (The only court of appeals that has explicitly considered the question, however, has held that the Double Jeopardy Clause does apply to corporations. *United States* v. *Security National Bank,* C.A. 2, No. 76–1283, decided December 6, 1976. As this discussion indicates, we believe that this case was wrongly decided.) We did not argue in the court of appeals, however, that the Double Jeopardy Clause does not apply to corporations, and accordingly we have not presented it as a question for resolution by this Court.

[7] See *Logan* v. *United States,* 144 U.S. 263; *Dreyer* v. *Illinois,* 187 U.S. 71; *Moss* v. *Glenn,* 189 U.S. 506; *Keerl* v. *Montana,* 213

valued right to submit his case to the jury empaneled at the first trial. *United States* v. *Dinitz,* 424 U.S. 600. A new trial may be held whenever a conviction is set aside on direct appeal (*Forman* v. *United States,* 361 U.S. 416; *United States* v. *Ball,* 163 U.S. 662) or on collateral attack (*United States* v. *Tateo,* 377 U.S. 463), even though the error requiring reversal should have led to outright acquittal at the first trial.[8] For example, if a conviction is reversed because the evidence was insufficient to allow the jury to convict, a second trial still may be held. *Forman* v. *United States, supra,* 361 U.S. at 424–425; *Bryan* v. *United States,* 338 U.S. 552, 560.[9]

In our view, only a "verdict of acquittal at the hands of the jury" (*Forman* v. *United States, supra,* 361 U.S. at 426) is an absolute bar to further proceedings. A verdict of acquittal is final even if returned under erroneous instructions. *Fong Foo* v. *United States,* 369 U.S. 141 (court instructed the jury

U.S. 135. All of these involved mistrials because of jury disagreement. See also *Simmons* v. *United States,* 142 U.S. 148; *Thompson* v. *United States,* 155 U.S. 271; *Wade* v. *Hunter, supra; Downum* v. *United States,* 372 U.S. 734, 736; *Gori* v. *United States,* 367 U.S. 364, 368.

[8] In the extraordinary case of *Hopt* v. *Utah,* 104 U.S. 631, 635, 110 U.S. 574, 114 U.S. 488, 492, 120 U.S. 430, 442, this Court reversed convictions after three trials for the same offense before affirming a conviction after a fourth trial.

[9] But cf. *United States* v. *Wiley,* 517 F. 2d 1212 (C.A. D.C.), which holds that, after a conviction is reversed because the evidence was insufficient, a second trial should not be held unless the insufficiency is attributable to causes beyond the control of the prosecution. This holding is predicated upon the powers conferred on appellate courts by 28 U.S.C. 2106, rather than on the Double Jeopardy Clause.

to return a verdict of not guilty in the middle of the prosecution's case, and the jury did so); *Kepner* v. *United States,* 195 U.S. 100; see also *United States* v. *Jenkins,* 420 U.S. 358 (verdict of acquittal by the judge acting as factfinder in a bench trial). In any other event, however, there is no absolute bar; rather, the court must look to the nature of the trial and the occasion that led to the termination of the prosecution.

If the defendant seeks or consents to a termination, even in mid-trial, without insisting upon his "valued right" to receive the verdict of the jury then empaneled (*Wade* v. *Hunter, supra,* 336 U.S. at 689), a new trial is allowed in almost every instance. See *United States* v. *Dinitz, supra.* It should make no difference whether the mid-trial termination is called a mistrial, an acquittal, or an order dismissing the indictment; whatever it is called, it is entered by the judge, who is not a factfinder and has no power to convict the accused. The word "acquittal" has no talismanic quality for double jeopardy purposes. *United States* v. *Sisson,* 399 U.S. 267, 270; *United States* v. *Wilson,* 420 U.S. 332, 335–339; *Serfass* v. *United States,* 420 U.S. 377, 392. The inquiry in every case is whether a second trial would deprive the defendant of an interest the Double Jeopardy Clause was designed to protect and, if so, whether that interest must "be subordinated to the public's interest in fair trials designed to end in just judgments." *Wade* v. *Hunter, supra,* 336 U.S. at 689. A defendant whose trial is aborted at his request—whether by a mistrial, by an

"acquittal" by the judge, or by an order dismissing the indictment—he has not been deprived of his valued right to present his case to the jury but rather has abandoned that right for reasons that seem sufficient to him. As the Court pointed out in *Dinitz*, it is often highly advantageous to defendants to terminate an ongoing trial. As in *Dinitz*, a second trial may be held in such cases if it is required by "the public's interest in fair trials designed to end in just judgments."

The case is more difficult if a trial is aborted over a defendant's objection. See *United States* v. *Jorn*, 400 U.S. 470, 474–475. Then the governing rule is stated by *Illinois* v. *Somerville*, 410 U.S. 458, and a new trial may be held if the first trial was terminated for pressing reasons amounting to "manifest necessity," such as a defect in the indictment that would make it impossible for the trial to end in a valid conviction. In *Somerville* itself the Court upheld a second trial after the first trial had been terminated to allow an indictment to be dismissed and the defendant to be reindicted on a valid charge. It should make no difference if the trial judge uses the words "dismissal of the indictment" rather than "mistrial" to describe the event that leads to the mid-trial termination of proceedings over the defendant's objection. As the Court pointed out, rigid or mechanical rules are inadequate tools to use in determining whether a second trial may be held. 410 U.S. 463, 467.

In sum, when a trial is terminated without a verdict by the finder of fact, the important interests secured by the Double Jeopardy Clause do not invariably

prevent a second trial. The Court strongly emphasized in the recent trilogy of *Wilson, Jenkins* and *Serfass* that an accused has an important interest in the finality of a *verdict* of acquittal by the finder of fact, but it declined to extend that rule to create an interest in the finality of every disposition in the accused's favor. In both *Wilson* and *Serfass* the *proceedings* in the district court terminated in the favor of the accused, yet the Court held that the accused had not acquired such an interest in the finality of that termination that appellate review was precluded. The accused's cognizable interest is in preserving the finality of verdicts of acquittal by the factfinder (as in *Jenkins*), not in preserving from review the finality of all dispositions by the trial court in his favor. Moreover, although an accused has an interest in preserving any findings of fact that may be made in his favor (see *Ashe* v. *Swenson*, 397 U.S. 436), when a trial terminates without a verdict by the factfinder there are no findings of fact to preserve. A second trial therefore cannot deprive the accused of the important interests guaranteed by the Double Jeopardy Clause.[10]

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[10] Several courts of appeals have adopted this view of the Double Jeopardy Clause and have allowed second trials after mid-trial aborts denominated "acquittals" or "dismissals of the indictment." See *United States* v. *Kehoe*, 516 F.2d 7 (C.A. 5), certiorari denied, 424 U.S. 909; *United States* v. *DiSilvio*, 520 F. 2d 247 (C.A. 3), certiorari denied, 423 U.S. 115; *United States* v. *Lee*, 539 F. 2d 612 (C.A. 7), petition for a writ of certiorari pending, No. 76-5187. See also *United States* v. *Sedgwick*, 345 A. 2d 465 (D.C. App.), certiorari denied, 425 U.S. 966. Other courts, however, have

Under the analysis we have set forth above, the court of appeals in the instant case should not have dismissed the appeal.[11] The jury did not return a verdict but was instead unable to agree; it found no facts that would be drawn into question in a second trial. The "acquittal" granted by the district judge two months after the jury had been discharged did not find any facts in respondents' favor, for only the jury is entitled to pass upon the facts; the court can rule only upon questions of law. See, *e.g., Singer* v. *United States,* 380 U.S. 24, 36; *United States* v. *Weinstein,* 452 F. 2d 704 (C.A. 2) (Friendly, J.), certiorari denied *sub nom. Grunberger* v. *United States,* 406 U.S. 917. Respondents were not deprived of their valued right to receive the verdict of the jury; the case went to the jury, which was unable to agree, and respondents did not object to the declaration of a mistrial and the dismissal of the jury. A second trial would not deprive respondents of their interest in preserving the finality of a verdict by the fact-

adopted a rule under which mid-trial terminations called "acquittals" or "dismissals of the indictment" by the trial judge are final, but terminations called "mistrials" may or may not be final. See *United States* v. *Scott*, C.A. 6, No. 76–1533, decided November 23, 1976; *United States* v. *Lucido*, 517 F. 2d 1 (C.A. 6); *United States* v. *Means*, 513 F. 2d 1329 (C.A. 8); *United States* v. *Robbins*, 510 F. 2d 301 (C.A. 6), certiorari denied, 423 U.S. 1048.

[11] Many scholars support our approach. See Friedland, *Double Jeopardy* 310 (1969); Sigler, *Double Jeopardy* 114 (1969); Mayers and Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1 (1960); Miller, *Appeals by the State in Criminal Cases*, 36 Yale L. J. 486 (1927); Note, *Government Appeals of "Dismissals" in Criminal Cases*, 87 Harv. L. Rev. 1822 (1974).

finder, because the factfinder returned no verdict. And although a second trial would expose respondents to additional expense and to another risk of conviction, it has been settled since *United States* v. *Perez, supra,* that such an exposure is consonant with double jeopardy principles when a mistrial is necessary because of jury disagreement.

The Court need not agree with our entire submission in this regard, however, in order to conclude that the court of appeals had jurisdiction over our appeal. This case does not involve a mid-trial dismissal.[12] As we now show, a second trial (and hence jurisdiction over the appeal designed to bring about that trial) was authorized by the single fact that the jury was unable to agree upon a verdict at respondents' first trial.

B. A SECOND TRIAL IS PERMISSIBLE AFTER A JURY IS UNABLE TO REACH A VERDICT AT THE FIRST TRIAL

The court of appeals thought that if a second trial would be required were the government to prevail on appeal, the government may not appeal; if no such proceedings would be required, the government may appeal. We submit that the court of appeals concentrated on the wrong factor. The proper inquiry is whether the further proceedings, after success by the government on appeal, would themselves violate the Double Jeopardy Clause. In other words, if a second trial is not barred by the Double Jeopardy Clause,

[12] The question of the propriety of holding a second trial after a mid-trial dismissal of the indictment at the request of the accused is squarely presented, however, in *New York* v. *Brown*, petition for a writ of certiorari pending, No. 76–358.

the government may appeal in an effort to bring about that second trial. If, on the other hand, proceedings on remand would offend double jeopardy principles, the government may not appeal an adverse disposition in the district court (there would, after all, be no continuing case or controversy in such circumstances).[13] In the instant case, then, the question is whether, after declaring a mistrial and dismissing the jury, the district judge could have set the case for a second trial. Since he could (and, if our appeal is sound on the merits, should) have set the case for another trial, then the government may appeal to require him to do so.[14]

This follows directly from *United States* v. *Sanford*, No. 75–1867, decided October 12, 1976. In *Sanford*, as here, a trial ended in a mistrial because the jury was unable to agree upon a verdict. Four months later the district court dismissed the indictment, concluding that the defendants had an absolute defense (the consent of federal officials) to the crime charged in the indictment. This Court held that the United States was entitled to appeal from that order of dismissal, because a second trial of the defendants would not violate the Double Jeopardy Clause.

[13] In England and some States the prosecution can appeal from judgments of acquittal to secure advisory opinions concerning the propriety of legal rulings by the trial court. See, *e.g.*, *People* v. *Dikeman*, 555 P. 2d 519 (Colo.). Such advisory opinions are not available in the federal system, however, because of the case or controversy requirement of Article III of the Constitution.

[14] See *United States* v. *Wilson*, 534 F. 2d 76 (C.A. 6), which implicitly adopts this analysis. Cf. *United States* v. *Jorn*, *supra*, which allowed the United States to appeal from a post-mistrial order dismissing an indictment.

The Court began in *Sanford* with the settled proposition that, after a mistrial has been declared because of jury disagreement, the Double Jeopardy Clause does not bar a second trial. That is true in the instant case no less than it was in *Sanford*. The Court went on (slip op. 3): "The District Court's dismissal of the indictment occurred several months after the first trial had ended in a mistrial, but before the retrial of respondents had begun. * * * The dismissal in this case, like that in *Serfass*, was prior to a trial that the Government had a right to prosecute and that the defendant was required to defend." The United States therefore was entitled to appeal in order to bring about the second trial that it "had a right to prosecute and that the defendant was required to defend."

And so it is here. Once the district court declared a mistrial and dismissed the jury, any double jeopardy bar to a second trial dissolved. There may be reasons why a second trial should not be held in this case, but the Double Jeopardy Clause is not among them. If the district court is right that a second trial should not be held because of insufficiency of the evidence, imprecision of the consent decree, or any other reason, respondents are presumably entitled to an affirmance on the merits that would erect a *res judicata* barrier against reprosecution.[15] Cf. *United States*

[15] If the insufficiency of the evidence were attributable to causes beyond the control of the prosecution, such as the erroneous mid-trial suppression of evidence at the request of the accused, the question of the propriety of a second trial should be evaluated differently. Cf. *United States* v. *Wiley*, *supra*.

v. *Oppenheimer*, 242 U.S. 85. But if the district court is wrong, then it should have ordered a second trial, and no double jeopardy principle stands in the way of appellate rectification of its failure to do so.

C. IT IS IMMATERIAL THAT THE DISTRICT COURT ACTED ON A MOTION FILED WITHIN SEVEN DAYS OF THE DECLARATION OF A MISTRIAL

The court of appeals concluded (Pet. App. 7a-9a) that *Sanford* does not control this case because in *Sanford* the motion to terminate the proceedings was made several months after the first trial, whereas here it was made six days after the first trial and granted two months later. In the court of appeals' view this made the district court's decision here an unreviewable "acquittal."

This line of argument is untenable. Here, as in *Sanford*, "[t]he *trial* of respondents on the indictment terminated not in their favor, but in a mistrial declared, *sua sponte*, by the District Court" (slip op. 2; emphasis added).[16] On a post-trial motion the district court terminated the *proceedings* in respondents' favor, but the trial had long since ended. The termination of the proceedings in respondents' favor is not significantly different from the termination of the proceedings in defendants' favor in *Sanford*, *Serfass* or *Wilson*. Indeed, the United States may not appeal under the first paragraph of the Criminal Appeals Act until the "proceedings" in the trial court have terminated in defendants' favor.

[16] Cf. *Jenkins*, *supra*, 420 U.S. at 365 n. 7.

Here, as in *Wilson*, in which the indictment was dismissed in response to a motion made within seven days of the termination of the trial, a decision on appeal in the government's favor would simply return the case to the posture it was in before the erroneous termination. In *Wilson* the appeal was permissible because it did not lead to a second trial; here, although reversal on appeal would lead to a second trial, the Double Jeopardy Clause is not offended because a second trial is permitted after a manifestly necessary mistrial.

The functional inquiry in each case is whether the accused has been deprived of something the Double Jeopardy Clause protects. The answer to that question cannot possibly turn upon whether a motion to terminate the proceedings was filed six days, eight days, or two months after the trial ended in a mistrial. Rule 29(c) affords defendants seven days in which to file post-trial motions for judgments of acquittal. There is no reason to suppose that the draftsmen of that Rule thought they were selecting a deadline with constitutional significance, and nothing in the commentary of the Advisory Committee would support such a conclusion. Rule 29(c) sets a convenient time limitation for the filing of a particular motion; it has no meaning whatever for double jeopardy purposes. A district court, responding to a motion filed under Rule 29(c), may state reasons (such as the alleged vagueness of the consent decree) why there should not be further proceedings, but these reasons are not founded on the Double Jeopardy

Clause and they neither add to nor detract from the protections of that Clause.

In sum, the timing of the post-trial motion does not affect the interests protected by the Double Jeopardy Clause. An accused has no greater interest in the finality of a legal decision by a district judge (filed two months after the trial ended) when his motion is filed six days after the mistrial than when his motion is filed eight days after the mistrial. Nor has he any greater interest in avoiding the rigors of a second trial in the one instance than in the other. And his interest in preserving his valued right to have the case decided by the first jury empaneled is similarly not affected by the timing of a post-mistrial motion; the case was submitted to the first jury, and his valued right was preserved.

Thus, what happens *after* a mistrial has been declared is irrelevant to the constitutional analysis. All of the factors that either allow or forbid a second trial are fixed at the moment the jury is dismissed. If, at that moment, the district court could have set the case for a second trial without violating the Double Jeopardy Clause, then the United States should be able to engage in such appellate proceedings as may be necessary to bring about that second trial. The fact that the district court may act in response to motions filed within seven days of the mistrial shows that it acted within the authority granted it by the Rules of Criminal Procedure, but it shows nothing about the power of an appellate court to correct an error or about the application of the Double Jeopardy Clause.

Suppose that the district court in this case had granted the judgments in respondents' favor (as it did) two months after the mistrial had been declared, but the district court *sua sponte*[17] had declared that it made a legal error and should not have entered judgments for respondents. It is unlikely that the district court's correction of its own mistake would violate the Double Jeopardy Clause.[18] If that action would not violate the Clause, how could it violate the Clause for a court of appeals to inform the district court that it erred and to direct it to proceed to a second trial?

Similarly, suppose that in this case the district court had denied respondents' motions for judgments of acquittal and set a date for a second trial, and respondents were allowed to take an interlocutory appeal. If the court of appeals had reversed and ordered the entry of judgments of acquittal, could it seriously be argued that the United States could not seek review in this Court? In *Wilson* this Court observed that such a ruling would be reviewable in this Court, and it remarked (420 U.S. at 345): "It is difficult to

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[17] Or at the request of the prosecution within 30 days. See *United States* v. *Dieter*, No. 75–1547, decided October 12, 1976.

[18] In *Forman* v. *United States*, *supra*, a court of appeals initially reversed a judgment of conviction and ordered the indictment to be dismissed. On rehearing it ordered a second trial to be held. The defendants argued that the initial decision of the court of appeals gave them a vested right to dismissal of the indictment and that the Double Jeopardy Clause prevented the court from changing its mind. This Court disagreed (361 U.S. at 424–426), holding that the court was entitled to correct its own error and to order such further proceedings as it deemed appropriate, even though the defendants had not asked for a new trial.

see why the rule should be any different simply because the defendant has gotten a favorable post-verdict ruling of law from the District Judge rather than from the Court of Appeals, or because the District Judge has relied to some degree on evidence presented at trial in making his ruling." The situation here is the same: If the United States could have obtained review in this Court of an appellate decision that respondents should be acquitted, there is no reason why the United States may not obtain review in the court of appeals of the identical post-trial decision by the district court.

D. IT IS IMMATERIAL THAT THE DISTRICT COURT'S ORDER TERMINATING THE PROSECUTION IS BASED UPON A BELIEF THAT THE PROSECUTION FAILED TO PROVE ITS CASE

The court of appeals' belief that *Jenkins* controls this case and forbids a second trial apparently is based in part upon the fact that the district court's judgments of acquittal were grounded upon the events of trial and go to the "general issue."[19] Respondents have made the similar argument that the Double Jeopardy Clause bars appeal because the district court's decision was "based on evidence adduced at trial" (Br. in Opp. 4).

[19] The court of appeals may have been confused about the nature of the judgment in this case. It characterized the district court's ruling as a "directed verdict of acquittal" (Pet. App. 2a, 3a, 5a n. 6, 6a), as if the judge had instructed the jury to return a verdict of acquittal. That was the situation in *Fong Foo* v. *United States*, *supra*, but not here; in the instant case the jury had been discharged two months before the district court entered a "judgment of acquittal." "Directed verdicts" were abolished by Fed. R. Crim. P. 29(a).

Jenkins does not control this case. It involved an acquittal, on the facts, by the trier of facts. In a jury trial, however, only the jury tries the facts. "[T]he Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before [a jury,] the tribunal which the Constitution regards as most likely to produce a fair result." *Singer* v. *United States*, *supra*, 380 U.S. at 36. In a jury trial the judge may determine whether the evidence, in the light most favorable to the government, is sufficient to support a conviction, but this is an entirely legal question; the judge is not empowered to resolve disputed issues of fact, and an appeal would not lead to a second trial at which facts found in the appellee's favor by the first tribunal would be reexamined.

As we understand respondents' argument, it is that even though the district court could have allowed a second trial in this case, the judge's decision not to do so, based on facts outside the indictment, is immune from scrutiny. This mistakes the nature of the inquiry appropriate in cases of this sort: the proper question is whether further proceedings in the district court would be forbidden by the Double Jeopardy Clause, not whether the district court relied upon one or another ground in support of its decision to terminate proceedings. In *Wilson* the district court relied on facts introduced at trial, and the court of appeals held that this made the district court's action an unreviewable acquittal, yet this Court held that the decision dismissing the indictment could be reviewed, and that its characterization as an acquittal

was constitutionally irrelevant to the government's right to appeal (420 U.S. at 347–351). In *Serfass* the district court decided the "general issue" of guilt or innocence, yet the Court held that its decision could be reviewed. In *Sanford* the district court relied on facts adduced at trial and decided the general issue by holding that there was a complete defense of governmental consent, yet this Court held that the district court's decision could be reviewed and a second trial could be held if the district court had erred. In short, a district court's reliance on facts outside the indictment is not sufficient to insulate its decisions from appellate review, so long as the proceedings on remand in the district court would not themselves violate the Double Jeopardy Clause.

Even a decision by the district court that the evidence is insufficient to support the conviction, and the consequent entry of a judgment of acquittal on a post-trial motion pursuant to Rule 29(c), does not create a bar to appellate review. In *Jenkins, supra,* 420 U.S. at 365, the Court explained that "where the jury returns a verdict of guilt but the trial court thereafter enters a judgment of acquittal, an appeal is permitted." See also *United States* v. *Donahue,* 539 F. 2d 1131 (C.A. 8); *United States* v. *Burroughs,* 537 F. 2d 1156 (C.A. 4); *United States* v. *Cravero,* 530 F. 2d 666 (C.A. 5); and *United States* v. *De Garces,* 518 F. 2d 1156 (C.A. 2), which hold that the prosecution may appeal from post-trial acquittals, on the basis of the evidence adduced at trial, where the jury has returned a verdict of guilty.

Wilson, Serfass, Jenkins, Donahue, Burroughs, Cravero and *De Garces* establish that nothing in the

Double Jeopardy Clause creates a barrier to appellate review of decisions by the district judge, in jury trials, going to the general issue or based upon the facts adduced at trial. The reexamination of the decision of the judge, in a jury trial, does not itself violate the Fifth Amendment. That being so, the only objection to an appeal by the prosecution in the instant case is that a decision in its favor would lead to a second trial. That objection is insufficient; the second trial is authorized by the jury's inability to agree upon a verdict at the first trial. This case is, therefore, exactly like *Sanford* (slip op. 3): "The dismissal in this case, like that in *Serfass,* was prior to a trial that the Government had a right to prosecute and that the defendant was required to defend. Since in such cases a trial following the Government's successful appeal of a dismissal is not barred by double jeopardy, an appeal from the dismissal is authorized by 18 U.S.C. § 3731."

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded with instructions to consider the merits of the appeal.

Respectfully submitted.

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DECEMBER 1976.

U.S. GOVERNMENT PRINTING OFFICE: 1976

FILED
JAN 25 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-120

UNITED STATES OF AMERICA,

Petitioner,

v.

MARTIN LINEN SUPPLY COMPANY and
TEXAS SANITARY TOWEL SUPPLY CORPORATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE RESPONDENTS

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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BRIEF FOR THE RESPONDENTS

Respondents respectfully request that this Court affirm the judgment of the United States Court of Appeals for the Fifth Circuit (opinion reported 534 F.2d 585).

I. QUESTION PRESENTED

Petitioner has revised its Question Presented in its latest Brief to this Court. Unfortunately, however, Petitioner continues to ignore the critical fact that the Trial Court entered its Judgments of Acquittal pur-

suant to Rule 29(c), Federal Rules of Criminal Procedure. The Question Presented, properly stated, is:

> "Does the Double Jeopardy Clause preclude an appeal of an acquittal pursuant to Rule 29(c), Federal Rules of Criminal Procedure, which was entered after the jury was unable to reach a verdict?"

II. STATEMENT OF THE CASE

The Government charged that Respondents were in criminal contempt of an antitrust consent decree. This case was tried to a jury. After both sides had rested, the jury began its deliberations but could not agree on a verdict as to either Respondent. It reported to the Trial Court that it was hopelessly deadlocked. The Trial Court orally discharged the jury and stated to the parties that he was "open to any motions that either side would like to file". (A. p. 33) Pursuant to Rule 29(c), Federal Rules of Criminal Procedure, Respondents timely filed their respective Motions for Judgment of Acquittal. The Trial Court granted Respondents' motions and found the Respondents "not guilty" of the charges against them. (Pet. App. p. 41a, 43a) In its "Judgment(s) of Acquittal" the Trial Court expressly held that (1) the Respondents' Motions were "timely filed at the close of all the evidence", (2) "the Government has failed to prove the material allegations beyond a reasonable doubt" and (3) Respondents "should be found not guilty". (Pet. App. p. 40a-43a)

The weight of Petitioner's evidence is immaterial to this appeal. The sole issue is whether the Trial Court's Judgments of Acquittal are reviewable. In

fact, Petitioner's evidence was so sparse that the Trial Court observed:

> "I'll be frank with you, gentlemen. I almost instructed a verdict for all Defendants in this case. I almost granted a judgment for the Defendants. . . . I have seen some contempt cases, but this is without a doubt the weakest I've ever seen." (A. p. 30)

Moments later, the Trial Court observed further:

> "I just don't see how in this particular instance that this proof would show criminal intent or contumacious acts under this consent decree." (A. p. 32)

III. SUMMARY OF ARGUMENT

A Rule 29 Judgment of Acquittal is an integral part of the trial and was *the* final judgment terminating this trial based on the evidence adduced at the trial and the finding that the Defendants were not guilty. A reversal of that Judgment would require a second trial putting the Respondents in jeopardy a second time for the same offense. A second trial here would violate the Double Jeopardy Clause as interpreted in the holdings of this Court and those of the Second, Fifth and Sixth Circuits.

IV. ARGUMENT

Petitioner's Brief simply ignores the central issue in this case and postulates that the Trial Court cannot enter a judgment of acquittal based on the evidence. Actually, the only issue before the Court is whether the Fifth Amendment to the United States Constitution prohibits a review of the Trial Court's Judgments of Acquittal.

The Constitution provides that "... [n]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb". The Government seeks the opportunity to reverse the Trial Court's acquittal and to re-try the Respondents for the same offense.

A. A Rule 29 Judgment of Acquittal Is a Continuation of the Trial Proceeding

Jeopardy attached as to Respondents when the jury was impaneled and sworn. *Downum* v. *United States,* 372 U.S. 734 (1963).

Despite Petitioner's argument to the contrary, Respondents' trial terminated with the entry of *Judgments of Acquittal,* not a mistrial. Similarly in *Fong Foo* v. *United States,* 369 U.S. 141, 143 (1962), this Court said:

> "The trial did not terminate prior to the entry of judgment, as in Gori v. United States, 367 U.S. 364. It terminated with the entry of a final judgment of acquittal as to each petitioner."

Each judgment specifically stated that Petitioner had failed to carry its burden and that the respective Respondent was *"not guilty."* (Pet. App. p. 40a-43a) As Petitioner observed, "terminations called 'mistrials' may or may not be final". (Pet. Brief p. 18) In this case, the Trial Court's oral order of mistrial was not final, nor was it so intended. The Trial Court expressly indicated that thereafter he would entertain motions from either side. (A. p. 33)

Respondents filed and the Trial Court granted the Motions for Judgment of Acquittal pursuant to Rule 29(c). *United States* v. *Martin Linen Supply Co.,* 534 F.2d 585, 587 (5th Cir. 1976). Rule 29 empowers the

Trial Court to grant a Defendant's Motion for Judgment of Acquittal which may be made (1) at the close of the evidence, (2) while the jury deliberated or (3) within seven days after a guilty verdict or the jury is unable to reach a verdict. Thus, Rule 29 extends the time of the trial through the determination of a Motion for Judgment of Acquittal which is made within seven days after a guilty verdict or the jury's dismissal. In this way, Rule 29 gives the Trial Judge flexibility in handling a criminal trial and in insuring justice, and his judgment of acquittal becomes the final judgment terminating the trial. Petitioner ignores the fact that under Rule 29 entry of the Court's judgment of acquittal is part of the trial.

The Trial Court's granting of Respondents' Motions had the same effect as if, pursuant to Rule 29(a), he had ordered an acquittal before the jury had retired.

Petitioner argues that it is immaterial that the Trial Court labeled his order an "acquittal". Regardless of the semantics, the Trial Court's action was an "acquittal" in substance as well as form. Rule 29 grants to the Trial Court the power to enter a "Judgment of Acquittal" within specified time limits. The express finding that the Respondents are *NOT GUILTY* based on the full record adduced at the trial makes the Trial Court action an acquittal in substance as well as form. Under Rule 29, the instant case terminated in an acquittal not a mistrial. 534 F.2d at 588. Thereafter the Double Jeopardy Clause bars a second trial.

Petitioner apparently feels that the Government's "right" to a jury trial overrides the Fifth Amendment's guarantee against Double Jeopardy. However, this is not the law.

One of the great ironies of this case is that the Government seeks to compel a second trial of this case when the Trial Court has found that Respondents have not flouted or denigrated the power of the Trial Court. The Government seeks to punish the contempt of the Trial Court, despite the same Trial Court's holding that no contempt has occurred.

B. The Trial Court's Judgment of Acquittal Was Proper and, Under the Authorities, Is Not Appealable

This Court recognized the power of the Trial Judge, under Rule 29, to make factual determinations in a jury trial in *United States* v. *Sisson*, 399 U.S. 267 (1970). In *Sisson*, the jury had returned a guilty verdict and the Trial Court entered an Arrest of Judgment pursuant to Rule 34, Federal Rules of Criminal Procedure. Writing the opinion of the Court, Mr. Justice Harlan observed:

> "... [I]n this case it was the judge—not the jury—who made the factual determinations. This difference alone does not support a legal distinction, however, for judges, like juries, can acquit defendants, see Fed. Rule Crim. Proc. 29." 399 U.S. at 290.[1]

The Double Jeopardy Clause bars a review of the Trial Court's factual determination of acquittal be-

[1] This is also the Fifth Circuit's holding in this case. In the opinion below, the Fifth Circuit stated:

> "The Government argues that its right to insist on a jury trial would be abridged if this Court views the proceedings below as if they were the result of a bench trial. This assertion ignores, however, the fact that whether the trial is to a jury or to the court, if the evidence is deemed insufficient to support a verdict or finding of guilty the court must grant a directed verdict of acquittal. *United States* v. *Martinez*, 5 Cir. 1973, 486 F.2d 15, 23." 534 F.2d at 588, n. 6.

cause (1) jeopardy attached, (2) the first trial terminated in acquittal and (3) a second trial would twice put the Respondents in jeopardy for the same offense.

This Court's holdings in *Fong Foo* v. *United States, supra,* and *United States* v. *Jenkins,* 420 U.S. 358 (1975), dictate the inescapable result of this appeal. Mr. Justice Marshall summarized the facts and holding of *Fong Foo* when he wrote:

> "In Fong Foo the trial court had interrupted the Government's case and directed the jury to return verdicts of acquittal as to all the defendants. This Court held that even if the District Court had erred in directing the acquittal, the Double Jeopardy Clause was offended 'when the Court of Appeals set aside the judgment of acquittal and directed that the petitioners be tried again for the same offense.' Id., at 143. *The Court noted that although retrial is sometimes permissible after a mistrial is declared but no verdict or judgment has been entered, the verdict of acquittal foreclosed retrial and thus barred appellate review.*" *United States* v. *Wilson*, 420 U.S. 332, 347-48 (1975) (emphasis added).

In a footnote, Petitioner argues that since "[d]irected [v]erdicts were abolished" by Rule 29(a), *Fong Foo* is inapplicable. (Pet. Brief p. 26) In fact, Rule 29(a) merely enables the Trial Court to order an acquittal without the formality of having the jury return a directed verdict. Rule 29(a) does not substantively change the effect of a Trial Court's action in ordering an acquittal.

In *Jenkins* this Court denied the appealability of an acquittal entered by a Trial Court after a bench

trial. Writing for the Court, Mr. Justice Rehnquist stated:

> "When a case has been tried to a jury, the Double Jeopardy Clause does not prohibit an appeal by the Government providing that a retrial would not be required in the event the Government is successful in its appeal." 420 U.S. at 365.

In his summary, Mr. Justice Rehnquist indicated the proper result in the instant case when he wrote:

> "In those few cases that have reached this Court where the appellate process was initiated by the Government following a verdict of acquittal, the Court has found the appeal barred by the Double Jeopardy Clause. . . . But it is enough for purposes of the Double Jeopardy Clause, and therefore for the determination of appealability under 18 USC § 3731, that further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand." 420 U.S. at 369, 370. (citations omitted).

In *Jenkins* this Court affirmed the Second Circuit's decision dismissing the appeal for lack of jurisdiction. A year after its own decision in *Jenkins,* the Second Circuit decided a case whose determinative issue was identical to that now before this Court: *United States* v. *Suarez,* 505 F.2d 166 (2d Cir. 1974). In a three count indictment, the Government charged Suarez with various drug offenses. The case was tried to a jury. At the close of the Government's case, Suarez moved for Judgments of Acquittal on all three counts pursuant to Rule 29. The Trial Court granted the motion as to only one count. The jury retired and, as in this case, became deadlocked. After the Trial Court declared a mistrial, Suarez renewed his Rule 29 Motions for

Judgment of Acquittal. After the Trial Court had granted the motions, the Government appealed.

The Second Circuit held:

> "There has been a legal determination of innocence on the basis of the facts, adduced at the trial, relating to the general issues of the case, and therefore on the basis of *Jenkins* and the authorities relied upon in the majority opinion, the appeal is dismissed for lack of jurisdiction by virtue of the constitutional ban of the Double Jeopardy Clause." 505 F.2d at 168.

The Government did not appeal the *Suarez* decision although it did appeal the Second Circuit's decision in *Jenkins.* Since 1974, no decision or change in a statute has occurred which would compel a different result than that reached in *Suarez.*

In 1975, the Sixth Circuit agreed with the Second Circuit that Rule 29 Judgments of Acquittal are not appealable. *United States* v. *Robbins,* 510 F.2d 301 (6th Cir. 1975), *cert. denied,* 423 U.S. 1048 (1976). In *Robbins,* after the Government had rested in a jury trial, the Trial Court removed the case from the jury and granted Defendant's Motion of Acquittal pursuant to Rule 29(a). The Sixth Circuit held that the Double Jeopardy Clause forbade a review of the Trial Court's judgment. The Court emphasized that the critical element was that the Trial Court's decision "rested upon evidence introduced by the government at trial, and therefore, no appeal lies from the judgment of acquittal". 510 F.2d at 302.

In *Robbins, Suarez* and the instant case a Trial Court found the respective Defendants not guilty on the basis of the evidence adduced at the trial. The Second, Fifth and Sixth Circuits have agreed that the

Double Jeopardy Clause bars a review of Rule 29 Judgments of Acquittal.

Petitioner cites no case which has allowed an appeal of a Rule 29 Judgment of Acquittal, which occurs during a trial or after a mistrial. It completely ignores *Suarez,* which is identical both in fact and result to the Fifth Circuit's in this case. Without supporting authority, Petitioner asserts that this Court's holding in *United States* v. *Sanford,* 97 S. Ct. 20 (1976) controls this appeal. (Pet. Brief p. 9) Both the Second and Fifth Circuits have held that *Jenkins* is the controlling authority for this fact situation.

The Fifth Circuit in the case at bar distinguished *Sanford* from the instant case:

> "Since the time for a Rule 29(c) motion had apparently long since elapsed in *Sanford,* the case no longer fell into the category of a mistrial followed by a timely acquittal. Rather, the district court's order was simply a pretrial dismissal, and as such was subject to the *Serfass* decision's rule." 534 F.2d at 589.[2]

[2] This Court has effectively distinguished *Sanford* from this case in its most recent opinion, *United States* v. *Sanford,* 97 S.Ct. 20 (1976). This Court held that since *Sanford* was dismissed "after the first trial had ended in a mistrial, but before the retrial of respondents had begun," *Sanford* was controlled by the pre-trial dismissal holding of *Serfass* v. *United States,* 420 U.S. 377 (1975). 97 S. Ct. at 21. Therefore, this Court did not reach the facts here. In its second *Sanford* decision, this Court quoted from *United States* v. *Perez,* 9 Wheat. 579, 580 (1824): "The prisoner has not been convicted or acquitted and may again be put on his defence." Here, both Respondents have been acquitted. The trial terminated with Judgments of Acquittal. (See *Fong Foo, supra* at p. 143, *supra* at p. 4) Thus, the *acquittal,* not *dismissal,* occurred not *pre-trial* or *post-trial* but *during* trial. This Court, in effect, distinguished *Sanford* from this case when it said:

> "The trial of respondents on the indictment terminated not in their favor, but in a mistrial declared, *sua sponte,* by the District Court." 97 S.Ct. at 21.

In addition, *Sanford* differs from this case in the essence of the *Sanford* court's order. In *Sanford,* the court held that assuming the Government's evidence to be correct, the Defendant could not be prosecuted. Thus, the *Sanford* trial court did not review the sufficiency of any evidence in making his decision, but rather, assumed the Government's case to be proven. In the instant case, the Trial Court held that the Government failed to prove its case.

On June 2, 1975, this Court entered its first reversal of the Ninth Circuit's holding in *Sanford.* At that time the Petition for Writ of Certiorari in *United States* v. *Robbins, supra,* was pending before this Court. While holding that *Serfass* v. *United States,* 420 U.S. 377 (1975), controlled the *Sanford* dismissal, this Court at the time denied the Petition for Writ of Certiorari in *Robbins.* This Court's refusal to grant a Writ of Certiorari in *Robbins* while reversing *Sanford* indicates that there may be a difference between a Rule 29 Judgment of Acquittal and a dismissal based on a motion which was not made until months after the Rule 29 time requirements elapsed.

Petitioners also cite *Wilson* and *Serfass* as being important to the determination of this appeal. Both of these cases have distinctly different facts and are of only incidental value to this appeal. *Serfass* established the appealability of a pre-trial dismissal. Chief Justice Burger, writing for the Court, observed that pre-trial dismissals are a review of an indictment's sufficiency in legal terms and are *not based* on evidence adduced at trial. In addition, since jeopardy had not attached, the defendant could not claim the protection of the Double Jeopardy Clause.

Wilson established the appealability of an acquittal after a jury verdict of guilty. The *Wilson* rationale

was that a reversal could reinstate the guilty verdict without a second trial. Therefore, Wilson would not "again be tried for the same offense".

Respondents have not extended this Brief, unduly and unnecessarily, by a detailed discussion of the Petitioner's citations which, for the most part, are completely irrelevant to the issue before this Court. Instead, Respondents have cited and discussed herein only those cases pertinent to the limited issue presented by this appeal.

V. CONCLUSION

Respondents had been put in jeopardy when the trial terminated with the Trial Court's Rule 29 Judgments of Acquittal.

A reversal of those Judgments would require a second trial putting the Respondents in jeopardy again for the same offense.

Petitioner's Brief cites no case in which a Court has allowed an appeal of a Rule 29 Judgment of Acquittal absent a guilty verdict. The Second, Fifth and Sixth Circuits have held that Rule 29 Judgments of Acquittal are not appealable unless there is a guilty verdict.

Critical to and determinative of this Appeal is the fact that the Trial Court, within his power under Rule 29, determined that, in considering all "of the evidence adduced on the trial", the Respondents were *NOT GUILTY*. A reversal of the Trial Court's decision would require further proceedings of factual determinations in contradiction of the express holdings of *Jenkins, Fong Foo, Suarez* and *Robbins* and in violation of the Fifth Amendment to the Constitution of the United States of America.

Respectfully, this Court should affirm the holding of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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January 26, 1977